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All readers of this journal will have been delighted to see the name of its ex-editor, Professor Winfield, K.C., F.B.A., among the Knights Bachelor in the summer honours list of 1949. The number of academic lawyers who have won this distinction is indeed small, and no one will question the appropriateness of Sir Percy's place among them.

With him in the list was his old friend the Deputy Keeper of the Records, who has so often lectured in the Law School by invitation of the Managers of the F. W. Maitland Memorial Fund. It is, therefore, with special pleasure that we print an article based on Sir Hilary Jenkinson's recent course.

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SOME REFLECTIONS ON LAW AND LAWYERS[1]

LORD RADCLIFFE

THIS will be a random paper. I would rather give it a title at the end, when I have finished, than at the beginning, before I have started : but if christening must precede development, I will call it 'Some Reflections on Law and Lawyers'. Though it is well to remember how formidable an essay was in the past concealed under the disarming title of Reflections. In truth, the law seduces men of learning by the variety of its attractions and the specialisation which it encourages may prove, I think, a source of its undoing. We are all experts today; and experts, like kings, may rave, for all that the blows fall thick and fast upon the Achaeans.

So I have turned my back upon a number of fascinating subjects in order to have an occasion to consider what is the weight that we are to give to law and lawyers in this country today. It is nothing new to say that we are at a crisis, for the word crisis is a devalued currency. It is commonplace to say that the law has suffered a revolution under new social and administrative conditions, for we know that we are all spinning like tops and are dizzy with change. But it is not the fact itself that matters, for even the natural conservatism of the lawyer would admit that there are times in the affairs of nations when crises and revolutions are as necessary as purgatives. It is the significance that one tries to catch.

One thing obtrudes. Everyone is alive to it nowadays, but evils, if this be an evil, are not cured merely by being constantly referred to. The daily life of the ordinary man today is regulated far less by anything that can be called the common law of the kingdom than at any period that can be studied in our history. Too often this fact is obscured by quarrels about the tribunal that he may find himself before when he is in trouble. Of course there is a valuable paper to be written—and valuable books have been written—on the respective functions of the legal and the administrative tribunal. Lawyers tend to regard all administrative tribunals as being inherently encroachments on the proper legal field, and, I add at once, on the proper civil rights of the citizen. Here, as I think, we go too far, and in doing so I doubt if we serve the interest of our true client, the public. But then lawyers are at heart

[1] An address to the Cambridge University Law Society, October 21, 1949.

anarchists, in that by training they believe all executive power to be evil. Thoreau and Jefferson and, oddly joined, Herbert Spencer keep their conscience. It was Spencer who said, 'Government being simply an agent employed in common by a number of individuals to secure to them certain advantages, the very nature of the connection implies that it is for each to say whether he will employ such an agent or not'. And it was Spencer who wrote of 'that sentiment of power-worship which still misleads us by magnifying the prerogatives of constitutional governments as it did those of monarchs. Let men learn that a legislature is *not* our "God upon earth", though, by the authority they ascribe to it and the things they expect of it, they would seem to think it is. Let them learn rather that it is an institution serving a purely temporary purpose, whose power, when not stolen, is, at the best, borrowed'.

That is not a fashionable sentiment today, but it seems to me that it contains a good general principle: all power is suspect, your own as well as the next man's. And you will note that Spencer applies it as much to legislative as to executive power. To an eighteenth century political thinker that would have seemed curious: to one of the twentieth century it seems natural. We tend to forget that the perfection of the party system in Parliament, together with the virtual achievement of a single chamber legislature, has resulted in upsetting our whole constitutional balance, which depended on the conception of the King's Ministers and their executive departments being checked and, if necessary, mated by the Peers and Commons in Parliament assembled. Who paid the piper soon called the tune. But when the Ministers become no more than the product of a completely organised Parliamentary majority, legislative and executive power are merely two ways of expressing the same authority. That is why some notable defeats of the Executive in the law courts have proved short-lived victories for the citizen.

But I was speaking of the lawyer's general principle that a citizen should have no rights or obligations that are not capable of being vindicated in a court of law. The roots of this go far back in our history. Just as it took centuries for the fires of Smithfield to burn out of our race memory—have they yet?—so the lawyer may see a Star Chamber behind each departmental inspector. After all, the intellectual opposition to executive power which broke the Stuarts was largely maintained by men trained in the law. And they have reason to be proud of it: it was perhaps their most momentous contribution to our social development. But it seems to me futile to ignore the fact that our basic idea of trying a suit in law is inappropriate to the solution of many administrative problems in which the citizen becomes involved. A law suit is essentially a

contest between two sides who, or whose hired champions, do battle before the eyes of judge or judge and jury. Under such a system the tribunal itself does not so much prosecute justice as award it. The skill and resource of the winning team—if I may so describe it—are of predominant importance : indeed, just because it is a contest according to defined rules and the tribunal's main functions consist in administering the rules and awarding the prize, skill and resource tend to predominate over other less match-winning qualities in deciding the result of a case. It is hit or miss, win or lose. I am not quarrelling with the idea that lies behind this. I think that it suits, or has suited, the temperament of our race, whose tolerant scepticism leaves it with little confidence in ideal justice but whose sporting instincts take the most diverse forms of expression. Now all this is no good to the administrator. His problems demand continuous attention, not spasmodic intervention, and they require a consistent implementation of policy if justice is to be done between man and man, not the uncertain triumphs of a series of disconnected cases at law. It is not the administrative tribunal itself, to my mind, that is the villain of the piece. Nor is it, though it may be matter of regret, that the conduct and decision of the issue may lie with a man who is not a trained lawyer. For how long has the lay justice been a valued part of our judicial system? It is, of course, heady wine to be released from rules of procedure and evidence that would govern in a court of law. Not everybody is capable of withstanding the effects. I could wish that it was more generally recognised (and this is equally true of the lay arbitrator) that a legal rule is not to be departed from merely because it is a legal rule, and that by and large it is likely to have been evolved not to obstruct but to secure justice. Such rules are founded on a very long experience of human nature and of the fallibility of human testimony or deduction : they are prima facie good, not prima facie bad.

To a large extent then we must recognise a disagreeable necessity. The life of the citizen, as lived between himself and his neighbour or himself and the State, will flow increasingly outside the range of the courts of law, and he must teach himself to recognise, as he does not yet recognise, that in much that affects him there will be no redress to be looked for in the King's courts. Now that is not a good thing. Law has been too powerful and, as I believe, too much prized a thing in the development of this country through its long history for anyone who cares for its future to contemplate without dismay the spectacle of the law courts, high, dry, and desiccated, while the main flood of the life and activity of the people flows elsewhere in other channels. That is not just the point of

view of the lawyer who is jealous of the prestige of his calling. It is the point of view of any sensible man. Of course, any man who takes a pride in his calling—whether it is a craft or whether it is a profession—will want to maintain its status and will be confident of the value of its contribution to the well-being of his country. That is natural enough. But this is not merely a question for lawyers to discuss or to grieve over among themselves. It is a question that should be the concern of all who care for the life and vitality of our institutions.

'The preservation of the institutions of this country': the phrase has somehow a portentous, an old-fashioned, a Victorian ring. But then I think that the Victorians thought more vigorously about the significance of great social changes than we do nowadays. As I said before, we are dizzy with our experiences. But what does it mean? Society, after all, is only a number of men in association, and a number of men in association is potentially a mob. The individual needs moulds in which to pour his personality, and without the shape that those moulds give he can neither express himself nor realise himself. Nor, may I add, will he be a happy or a useful man. Now institutions, established institutions, provide those moulds; and certainly the State, or the country, which is a vast, and as vague as vast, generalisation cannot itself provide all the forms required. The problem of Statecraft is at once to foster institutions, since without them men are shiftless and unhappy, and to guard against them, lest they obtain a power or compel a loyalty that will disrupt the State itself.

But institutions, like the men they serve or master, are born in time. They cannot be ready-made. The great part of their hold on men lies in the association of history and in the natural and decent respect that is due to what is ancient and established. It is not too soon to mourn for the death of a society in which the word 'venerable' has become a word of mockery. If men cannot live by bread alone, certainly reason alone is no more satisfying fare. In truth a healthy society is sustained as much by loyalty to its institutions as by calculations of material gain or visions of immortal logic. And loyalty, as Roger Casement once said, is 'something less than love and more than law'.

In this country law has been a great institution. By that I mean that its presence has been felt as an active and permanent element in our society: and that, being so, it has contributed much to the formation of national character. I am dealing in wide generalisations. Any student of Bentham could confound me with instances where law had fallen far behind social feeling. For that matter anyone who holds that property corrupts more than lack

of possessions enfeebles might read me a lesson as to the extent to which our law has protected property at the expense of human dignity. But I think that my generalisation is fair and that law has been recognised as being one of our great institutions. To take one instance, it would be a study of the greatest interest to try to appraise the influence of our theory of contract, as it began to be formulated, say, by the sixteenth century, upon the history of England and of other countries. A binding legal relationship established by mutual promises, no more : no forms, no visits to officials, and, subject to a few obvious limitations, no restrictions as to the nature or range of the promise ! Put in commonplace language, that is the way to teach men to think for themselves and, for that matter, to look out for themselves : put in more high-flown phrases, it is a symbol of a great emancipation of the human spirit. And, of course, the contractual theory was soon to find itself pressed into the service of the great political debate, Whence is State power ultimately derived ? and to be the basis of the claim that there was an ascertainable compact between sovereign and subject.

To be ' law-abiding ' is still to be, I think, one commended by his fellows. It is not yet a cause for contempt. Whether it will not become so if law continues to be increasingly ready-made and increasingly unintelligible is a matter that deserves thought. It is true that we have quite enough people among those with money or position who contrive to regard those laws that interfere with their pleasures as being just those laws that no one would be so dull as to observe : and there are their allies, more or less at the other end of the social scale, who are against the law from want or predilection. But in between, as I believe, there remains the great mass of us who believe that we should keep the law, even if it is inconvenient to us, but who are by necessity often unaware of what the law in fact may be on any particular point.

What I ask is, are we sufficiently aware of the nature of law as an institution ? Or are we playing fast and loose with one of the great structural forces of our society, unconscious even that in the affairs of men the power to destroy does not carry an equivalent power to create ? Except on paper. ' When I have plucked the rose, I cannot give it vital growth again, It needs must wither '. For what law is not, in essence, is the command of a ruler. And what law more and more tends to become in England is the command of a ruler, even if he be according to the democratic canon but an emanation of ourselves. So the essence is departing. Let us try to see clearly what is involved in this. It would, I imagine, be a very great exaggeration to represent the courts of

law as mainly occupied today in interpreting recent Acts of Parliament or the Regulations or Orders that attend upon them : but I think that most judges would say that in a large proportion of the cases that come before them the rights of the parties are, if not determined, at any rate substantially affected by the terms of some recent Act or Order. Now this, I think, is the real crisis of our times. The respect for law, without which it will certainly never be readily obeyed, cannot survive the spectacle of its continual making and remaking before our eyes. Human nature is not so constituted. In the past the wise men of the law were those who knew and could declare what had always been the rule. It was the sanction of antiquity—' as our fathers did, so shall we '—that gave to law its mysterious prestige. We all know that most men will accept a rule, if they are assured that it has ' always been done that way ', with a submission that they will not accord to a rule, however intelligently devised, that has been made for the occasion. Put it another way : custom is a much deeper spring of law than the wisdom of a lawgiver. Indeed custom—the established way—is *the* great spring of law. That is as true of ancient society as of our common law. I sometimes wish that we had never heard of these great lawgivers. As if any man could really invent a whole set of new laws out of his head and make them a working part of contemporary society ! A tyrant might : but would they survive his tyranny if they were much more than a codification of existing practice ? Indeed they have a great part to play, Solon and Moses and Hammurabi and the rest; but I suspect that their chief service lies less in their invention than in the prestige and antiquity that their names conferred on laws that came into existence by quite other means.

Civilisation is not, as we too readily assume, the natural order of things. It is, on the contrary, an immensely complicated and frail structure which it has taken vast labour to erect. So it is with law, one of the chief agents of civilisation. Because in this country we are accustomed to think of men as law-abiding and to take it almost for granted that the law will be respected, it is dangerous to think that this will always be the case, if we take away from law its accustomed hold upon men's minds. The sources from which the strength of that hold comes are much more various than a casual analysis suggests. Indeed this is one of the fields in which newness, with its comforting assurance of modernity, is a doubtful recommendation. Consider even the small question of judicial apparel and trappings. Legal mummery, a Benthamite would say. Typical example of the hopeless conservatism of the law, a realist would say. And if such things are in fact regarded as no more

than mummery, then they have outlived their useful purpose and should go. But are they? Anyone who has lived in the country knows that the assize still carries with it some echo of awed feelings and that the figure of the Red Judge still lingers in men's minds as a symbol of the wrath that visits the wrongdoer. I see good commonsense in this. The antique style reminds men that the law they live under has its roots in its past and their history and that it has the authentic validity of a growing thing.

I think that we must recognise that the status of the judiciary will be substantially different—and diminished—under a system in which the citizen's rights and duties are largely determined by statutes, orders and regulations. Because the function of the judge in those disputes that continue to reach the courts of law will tend to become that of the interpreter and expounder of these texts rather than of the wise man whose learning and experience make him a trusted repository of the common law. Now I do not want to be partisan in this issue. It may be that modern Society cannot be administered at all without a constant and largely unintelligible flood of orders and instructions. It may be so : or it may be better said that we have not yet found the administrative secret and we must get along as best we can until we do. It may be, too, that we must accept as inevitable and, if you please, desirable a change in the status of law and of the judges who administer it. We may gain in exchange a greater flexibility, a more rapid responsiveness to what are thought to be the changing needs of the moment. My aim is the limited one of trying to measure the significance of the change, and to make some contribution towards seeing that we do not destroy valuable elements in the structure of our society unawares. ἐν δὲ φάει καὶ ὄλεσσον, ἐπεί νύ τοι εὔαδεν οὕτως. And if the prayer of Ajax to Zeus in the XVII Book of the Iliad sounds oddly in a legal essay, let me remind you that I owe the quotation to Lord Dunedin's speech in *Sorrell* v. *Smith* [1925] A. C. at 716. I am not sure that that is not the last occasion upon which Greek was quoted in a Law Report.

But a Society in which the citizen's rights and duties are made for him, as it were, overnight, whether it be by Parliament or by officials, is a tyranny. I do not think that we ought to shirk the word, however benevolent the tyranny. Incidentally, older, and I think not unintelligent, political thinkers did not object to the tyrant because of his malevolence but because he was a tyrant. Nor did they accuse him of lack of popular support. That is by the way. The laws of a tyrant may be excellent laws in themselves —they very often are—but the sources upon which they draw for their hold on men's conduct are painfully thin. They are force,

in other words the policeman and the jail : and they are loyalty to the person of the tyrant, which at best is likely to be only a sectional thing. I do not think that a healthy legal system can be maintained indefinitely on those lines.

And in what a language are the citizen's rights and duties expressed today ! The tables of stone are broken indeed. We all know of this fault, and I do not want to take up your time by dwelling on it. But it is as well to see what are the consequences of jargon. I have once or twice referred to the law today as being unintelligible. In a sense it has always been that. The non-lawyer has never known the detail of his legal rights and duties, and he has generally felt, with considerable justice, that lawyers make an unnecessary mystery of them. But I think that it is true to say that in earlier periods most men had a fairly good general idea of what the law required of them, both as between themselves and the State and as between themselves and their neighbours. I doubt very much if that is true today. First of all, the volume and comparative inaccessibility of the material defeat even the willing inquirer. Secondly, the jargon and the deplorable habit of legislation by reference make even accessible material incapable of being understood. It seems to me that a sort of hieratic language has developed by which the priests incant the commandments. I seem to see the ordinary citizen today standing before the law like the laity in a medieval church : at the far end the lights glow, the priestly figures move to and fro, but it is in an unknown tongue that the great mysteries of right and wrong are proclaimed. Less and less, not more and more, as we would have hoped, the law is becoming the concern, because less and less it is the possession, of the ordinary man. Less and less it reflects the way of life and the recognised customs that he has come with familiarity to think of as his own. What willing allegiance can a man owe to a canon of obligation which is not even conceived in such form as to be understood ?

I have thought it valuable that the lawyer's has always been a learned profession. It may not continue to be one. Learning has not been an irrelevant adjunct to the study of the law : a delightful sort of crossword puzzle with which to distract the intelligence of clever men. Lawyers are learned men, more or less, because only by learning can they equip themselves to expound the law. But that assumption is based on the idea that the sources from which law is drawn are something deeper than the current volumes of Statutory Rules and Orders. A retentive, if not an encyclopædic, memory, a competent system of cross-indexing, and a little elementary skill in the art and principles of interpretation will equip him

adequately for that task. We have been accustomed to think that more is needed. Some knowledge of other legal systems than our own : some familiarity with the history and development of our own system : an intimate knowledge of the decisions and opinions of former judges and the views of commentators : that long wrestle, which ends only with the end of one's professional life, to grasp the major principles that underly a system of law so developed : and, finally, such powers of deductive reasoning as fate may endow a man with. It is with such weapons that we would equip a man for that strange calling which is neither so masterful as a craft, nor so precise as science, nor so imaginative as art, and yet which mixes the elements of all three and which we are disposed to rank among the great professions.

This profession has made a type, the English lawyer. Most of us know some, if none of us knows all, of the faults of the type. But, frankly, I do not want to see him much changed : not at present, at any rate. I think him valuable in the present stage of our history. Of course he is changing, but there seems to be a steady core inside him, like a tree, and I think that the study of law has helped to give him his firm roots and his solid structure.

Let us take a glance at him and fix one or two characteristics. Firstly, an odd thing : the lawyer has not been on the whole an unpopular figure. The judge has been a popular one. I go for my evidence to the great classics of popular literature and to the drama, for it is in such works that race consciousness is projected. How amiable, how shrewd, how impeccable the judge. Even the Lord Chancellor who hears *Jarndyce* v. *Jarndyce* applications in *Bleak House*—where, if anywhere, wigs are to be trampled under foot—comes off without any serious scratch, though his procedure gets a terrible drubbing. Dickens was, of course, a great comic artist and the court scene in *Bardell* v. *Pickwick* could hardly be expected to portray the judge in any light that did not contribute to the general merriment. But on reading again the chapter containing the ' full and faithful report of the memorable trial of *Bardell* v. *Pickwick* ' I am bound to say that I think that Mr. Justice Stareleigh emerges as rather a lovable little man, with just those defects of slight deafness and a misdirected sense of dignity that we treasure in an elderly relative.

The judge we can safely leave to look after himself. Though it is of some importance to notice how much he is an accepted and acceptable institution, and to hope that our future social fabric may be built round, but not apart from, him. It is the lawyer himself, one would think, who should be the much more vulnerable figure. He is, after all, the clever man, at any rate the man rather

cleverer than his fellows. The clever man is the sharp man : and the sharp man is the kind of figure who comes off badly in popular mythology. On the whole the lawyer seems to me to come out surprisingly well. Indeed it leaves me wondering whether the general run of men really resent the clever man as much as some clever men themselves like to suggest. I am not sure that the ordinary citizen does not rather prize the clever man as a kind of mascot and content himself, to even matters, with chuckling over his quiddities and exaggerating his tricks of manner. Of course there are rascally lawyers—a few in history, some in fiction, more in drama. Indeed, at one period, there was always a merciless lawyer foreclosing a mortgage on the old family estates and turning husband, wife and suffering children into the snowy night. Such tragic families were never, apparently, fortified by any advice as to the benevolent jurisdiction of a court of equity : they struggled on until the fifth act, when the mortgage was proved to be a forgery, under the medieval rigours of the common law. But, melodrama apart, the man of law lives in our popular literature as a marked conventional type, though a very creditable one. He varies little. He is learned, if a little limited : dry, with a slightly comical precision : kindly and humane at heart, though on the surface unfeeling and disposed to browbeat : more a man of affairs than a man of the world. Above all, he is a member of a caste : how should he not be, since he belongs to a profession? Bewigged and begowned, wearing the habiliments of an almost forgotten age, he can still be proud enough of his profession (and make others respect it enough too) to maintain his costume as a uniform and not as a fancy dress. He can bandy Latin tags with his opponent or proffer them with submission to the judge as if they were somehow more pregnant with meaning than their mere English equivalent. Detached reason might inquire whether, for instance, ' terminus a quo ' really means more than ' the point from which ' : what is the difference between ' ejusdem generis ' and ' of the same order '? ; and might suggest that ' de minimis non curat lex ' and ' lex non cogit ad impossibilia ' are not such good Latin that English prose cannot supply a pithy translation. I think that I know the answer. A lawyer who quotes a Latin tag is not just indulging his professional craving for jargon : he is at the same time recalling that he belongs to what is inherently a learned profession and that the law in which he places his argument has as its background a long history of service to the changing problems of mankind.

For myself, if I want to see the English lawyer portrayed, as it were, at the height of his form, in the richness of his quiddity, I turn to the novels of Trollope. Trollope was so much the subtler

observer of English life and ways than either of his more famous contemporaries, Dickens and Thackeray: if only because, unlike them, he never felt the impulse to respond to the Victorian passion for caricature. And he understood to perfection the English professional man. Obviously he knew lawyers at first hand. There is an amusing note on one page of his Autobiography, where he qualifies his statement 'I have never printed as my own a word that has been written by others' by adding 'I must make one exception to this declaration. The legal opinion as to heirlooms in *The Eustace Diamonds* was written for me by Charles Merewether, the present member for Northampton. I am told that it has become the ruling authority on the subject'. The last sentence I find a little difficult to swallow. But, personal friends apart, he was, it seems, fascinated by the legal character and the contrasting strength and weakness of the legal profession. In the result you will find in his books a real gallery of lawyers (very favourably presented I am glad to say) and much acute observation on legal matters. Let me try to leave a taste of his quality, by one or two instances, before I reach the end of my paper. There is Mr. Quiddenham Q.C. from the *Vicar of Bullhampton*. 'He was at the Chancery Bar, and after the usual years of hard and almost profitless struggling, had worked himself up into a position in which his income was very large and his labours never ending. Since the days in which he had begun to have before his eyes some idea of a future career for himself, he had always been struggling hard for a certain goal, struggling successfully and yet never getting nearer to the thing he desired. A scholarship had been all in all to him when he left school; and, as he got it, a distant fellowship already loomed before his eyes. That attained was only a step towards his life in London. His first brief, anxiously as it had been desired, had given no real satisfaction. As soon as it came to him it was a rung of the ladder already out of sight. And so it had been all through his life, as he advanced upwards, making a business, taking a wife to himself and becoming the father of many children. There was always something before him which was to make him happy when he reached it. His gown was of silk, and his income almost greater than his desires: but he would fain sit upon the Bench, and have at any rate his evenings for his own enjoyment. He firmly believed now that that had been the object of his constant ambition; though could he retrace his thoughts as a young man, he would find that in the early days of his forensic toils, the silent, heavy unillumined solemnity of the judge had appeared to him to be nothing in comparison with the glittering audacity of the successful advocate.'

Of all the members of the other branch of the profession whom Trollope deploys before us I think that I would name as my favourite Mr. Toogood in *The Last Chronicle of Barset*. It is mere self-indulgence to run through these names unless we are all together to be expert Trollopians : but I do not like to part with him, having mentioned his name, without quoting poor Mr. Crawley's final commendation : ' He is a man, my dear, who conceals a warm heart, and an active spirit, and healthy sympathies, under an affected jocularity of manner, and almost with a touch of assumed vulgarity. But when the jewel itself is good, any fault in the casket may be forgiven '.

The great repository of lawyers among Trollope's works is *Orley Farm*. I have never understood why it is that lawyers will quote to each other endless passages from the trial scene in Pickwick, which of course is a delightful piece of farce, but not one in a thousand seems to know the infinitely more interesting and more subtly observed account of the trial of Lady Mason. There is Mr. Furnival Q.C. who had been ' employed on abstruse points of law, had been great in will cases, very learned as to the rights of railways, peculiarly apt in enforcing the dowries of married women and successful above all things in separating husbands and wives whose lives had not been passed in accordance with the recognised rules of Hymen ' : there is Mr. Solomon Chaffanbrass, the great champion from the Old Bailey : and, third member of the team, there is the hero, young Mr. Felix Graham, who thinks, as most young lawyers have thought in their day, and often rightly, that the law practised so complacently by their seniors is sadly deficient in simplicity, brevity and in morals. One incident I have always treasured, for it seems to concentrate one of the great issues of the advocate's profession. I have said before that some of our difficulties in keeping the law courts as the general forum of the citizen's rights may be due to our ancient tradition that the legal action is essentially a contest between hired champions. Now young Mr. Graham took the view that successful advocates sometimes abused their right of cross-examination in the interest of their client, and exercised a skill that might have been turned to better purposes in trying to make an honest witness appear confused or even unreliable. Mr. Chaffanbrass regarded this as heresy, and whispered angrily as Mr. Graham got up to put his questions, ' I won't have our client thrown over for any etiquette—nor yet for any squeamishness '. Mr. Graham pursued his own course rather self-consciously (did I say that he was something of a prig?) and at the end of the trial this colloquy took place :

'Mr. Graham', said the ancient hero of the Old Bailey, 'you are too great for this kind of work I take it. If I were you, I would keep out of it for the future'.

'I am very much of the same way of thinking, Mr. Chaffanbrass', said the other.

'If a man undertakes a duty, he should do it. That's my opinion, though I confess it's a little old-fashioned: especially if he takes money for it, Mr. Graham'.

Well, there I think you have it. The justification of a profession lies in its successful balancing of the claims of the client 'to get his money's worth' with the claims of the profession to maintain its standards and with the claims of the public, which are sometimes forgotten in the contest. Such things are never ideally balanced in human affairs, and a powerful profession, just as much as a powerful craft or guild or union, is constantly exposed to the temptation of preferring its own standards and principles for not much better reason than that they are its own. Of course, our profession has known that temptation and I have no doubt that sometimes it has succumbed to it. But I think one or two things are worth saying as a pendent to that. Firstly, this is not a period, so far as my experience goes, in which lawyers are indifferent to the social obligations of their profession. Rather the reverse: there is more danger that some of the vital elements of professional life may be lost through a failure to appreciate in time what are the conditions upon which a profession exists. Secondly, the lawyer's calling has drifted a long way from the calling of the doctor or the priest. Looking back over a long period one may regret that the lawyer, on the whole, has been such a successful man. None the less, these three callings are still, pre-eminently, the 'confessor' callings. Their work lies among the troubles, the estrangements and the disasters of men and women like ourselves and, all professional success apart, the lawyer's skill, just as much as that of the others, has as its purpose to bring aid and comfort to those in distress. Such callings are essentially those which need both the restraint and the support of professional standards. And, to come back to where I began, the life of a people is enriched by the existence of associations within the State, to which a man may owe some of the infinitely diverse loyalties that can illumine the human spirit. As a people we have been careless of our heritage and of its strength. We must not be what Chesterton described in *The Secret People* 'naught but a naked people under a naked crown'.

If then there is anything in what I have been trying to say, we need at this critical time to take thought, so that everyone may

very surely understand what law is and why it has hitherto commanded, without intolerable strain, the general acceptance of people in this country. Unless we are clear about what it is not as well as about what it is, there is danger that we may lose the true value of this institution at a time when we need it most. And, once lost, only time and long effort can recreate it. We have been too much accustomed in this country to take for granted the preservation of our institutions, however great the violence to which they are subjected. Put another way, we are too ready to assume that something is feasible, because it is done in England, which would be plainly infeasible if done elsewhere. That shows great self-confidence, and the history of this people has been truly a remarkable one. But fate has made with it no covenant of perpetuity. We have no grant of exemption from the mortality of all human organisations. ἔσσεται ἦμαρ ὅταν ποτ' ὀλώλῃ Ἴλιος ἱρή. 'The day must come when sacred Ilium will fall.' As Ilium, so England. But the day of decaying institutions and enervated character may be deferred for centuries yet if we will but understand the causes which have made Englishmen free men, self-governed and self-controlled. Among those causes I believe the law to have played a leading part. So believing, I make it my hope to see a more general recognition that the King's Courts of Justice must remain in the centre of the national life and that it was freedom, not pedantry, that broadened down 'from precedent to precedent'.

SOME PRELIMINARIES TO THE STUDY OF ENGLISH COMMON LAW RECORDS [1]

HILARY JENKINSON

Introductory.

In his Inaugural Lecture [2] as Downing Professor at Cambridge in 1888 F. W. Maitland, after introducing to his hearers certain matters—the variety, classification and enormous mass of Legal Records surviving in England—which were then little appreciated, went on to develop two lines of thought : first, that the wealth of evidence contained in these Records needed, if it was to be utilised, the labour of Scholars trained in the Law ; and second, that it was evidence not only for Legal Historians but also, and much more, for other Historians and Students of every kind. The first of these propositions needs a little qualification : indeed Maitland himself would, I am sure, now qualify it, for some of the most enthusiastic and most successful Scholars who have followed in his footsteps have been not Lawyers but Historians.[3] Still it remains true that the first and worst difficulties to be solved are legal ones, obscurities not soluble by any of the ordinary aids to the understanding of ancient Documents in general but arising from points of Law : some of them points which the Historian might puzzle over for hours whereas the Lawyer would solve them in a moment ; all of them peculiar to this one great category of Records.

Writing and Language.

In the present notes I do not propose to deal at any length with what are, I suppose, the two most obvious difficulties confronting the beginner—those of *Writing* and *Language*—because neither presents us with a purely legal problem. It is true that the Lawyers ultimately developed out of an original single ' Court Hand ',

[1] Part of a Series of three Lectures delivered at Cambridge on the invitation of the Managers of the Maitland Memorial Fund in November 1949.

[2] Printed in Maitland's *Collected Papers*, Vol. I. Read in conjunction with his programme for the newly founded Selden Society, issued in the previous year, it presents an astonishingly comprehensive survey of a field then almost unknown.

[3] To name only two, Professor B. H. Putnam, our leading authority on medieval Justices of the Peace and their Records, and her Colleague the late Professor N. Neilson. Maitland himself has been recorded as saying that one of his first classes consisted of ' two faithful Women and William Cunningham ' : but the last named was later Archdeacon Cunningham, the Economic Historian, and the Women were Mary Bateson and Ellen A. McArthur, both distinguished Historians.

which served the purposes of business of all kinds, varieties of their own so peculiar that they may well dismay the Student who takes his first dose of Records in the shape of a sixteenth-century *Plea Roll* or *Foot of Fine* : but Legal Writing, in spite of that, does not require a lawyer's training to make its letters readable : the development of the ' Legal Set Hand ' is part of the general history of English Business Writings and should be studied in that light.[4] Indeed even the most exclusively Legal Hands, such as those of Cocker,[5] cannot profitably be studied without reference to the other ' Set ' Hands and to the ordinary ' Secretary ' of the same period : and for the first two and a half centuries from which Legal Records have survived to us [6] there is no difference over which the Student who merely wants to read need trouble his head between the hands of a Chancery *Enrolment*, an Exchequer *Memoranda Roll* and a Legal *Plea Roll*; nor between these official hands and those used in the Records of Local and Private Administration.

As to Languages—the Latin, apart from technicalities of vocabulary, differs in no way from that used medievally for other business purposes : and though the Anglo-Norman French of the medieval Year Books badly needs (as Maitland pointed out) a great deal of study, and its ultimate development (the patois of Lawyers of the sixteenth and seventeenth centuries [7]) is hardly less startling to the novice, upon a sudden confrontation, than are the Legal Writings, the difficulty is again largely one of vocabulary, complicated this time by eccentricities of spelling. In any case it does not constitute, for our present purposes, a practical problem because even in the thirteenth and fourteenth centuries, when it was commonly used in certain classes of Records, French appears scarcely

[4] See my *Later Court Hands* (Cambridge, 1927): in particular pp. 74 and 75.

[5] Edward Cocker, Godfather to a well-known proverb, was one of a large number of professional Writing Masters who are known to have practised, and in many cases published copy-books, in London during the seventeenth and early eighteenth centuries. All of them taught, apparently, the Legal as well as other writings, but Cocker's copies are the best known for the Legal hands and continued to be reproduced long after his death. He gives copies for the small and highly current, the medium and the large Legal : the latter being that described by one of the Norths (in a phrase afterwards borrowed and misapplied by Walter Scott) as resembling pig's ribs. See Roger North: *Lives of the Norths*, Jessop's ed. (1890), Vol. I, p. 22.

[6] *I.e.*, from the late twelfth to the mid fifteenth.

[7] It was still in common use by Lawyers at this date: indeed, Roger North, in his *Discourse on the Study of the Laws* (1824), p. 13, remarks : ' For really the Law is scarcely expressible properly in English, and, when it is done, it must be Françoise, or very uncouth. All moots and exercises, nay, many practices of the law, must be in French, at the bar of the courts of justice; as when Assizes or Appeals are arraigned, the Array, that is, Pannels of Juries challenged or excepted to, it must be done in French; so Courts, Bars, and such transactions as reach no further than the Bench, and Counsel, with the Officers, and not to the Country . . . are to be done in Law French '.

at all in the legal ones : the principal forms of which, by this time well established, kept (as old-established series usually did) to the Latin which, when they were first conceived, was the only language in use for purposes other than the colloquial.

What then, it may be asked, are the difficulties, other than those of Language and Writing, which bar the approach of the Student to Legal Records? The answer is, in one word, *Form*.

Plea Rolls and Writs.

The form, or rather forms, to which I have just referred are those of Wording and Procedure : but it will be necessary first to say something briefly concerning another—the outward form or shape taken by the Documents of which we are to speak. It need not detain us long, for I propose here to deal with only two—the *Plea Roll* and the *Writ* : and the second only in so far as it is an essential element in the understanding of the first. The *Plea Roll*, perhaps the most English of our many peculiarly national Records, had already evolved its most typical characteristics at the date from which the earliest examples, the Rolls of the *Curia Regis*, survive to us (the late twelfth century); and these continue unaltered, save in the constantly growing size, number and complexity of such Records, down to the Supreme Court of Judicature Act in the last quarter of the nineteenth. The form is not confined to any one of the Royal Courts [8] nor to central Administration but extends to Local and Private practice. It consists of a number of long narrow 'membranes' (about 9 inches by 30) cut generally from the whole length of a sheepskin, from neck to tail : a pile of anything from two or three of these up to five hundred or more, stabbed through at the head and fastened there by gut or cords, constituting a 'Roll',[9] though the later and larger specimens are quite unrollable.[10] The *Writs* (*Brevia*)—orders, in the wording of a formal letter to local or subordinate Officers, which originate or carry on a case—are small slips of parchment, perhaps no more than 9 inches by 2. 'Returned'—that is sent back, but not necessarily to the place from which they came—they convey in an endorsement or an annexed schedule or memorandum information as to how these orders have been met [11] : and being filed on a

[8] The long narrow 'Roll' here described is not strictly speaking peculiar to purely Legal Records—it is used also in the Exchequer *Memoranda Rolls* : but these are in effect quasi-legal; and it is not, so far as I know, normal elsewhere.

[9] The single membrane is also, rather confusingly, called *rotulus*.

[10] One of the later Rolls of the Common Pleas may weigh half a hundredweight.

[11] An unique *Sheriff's Roll* for Bedfordshire and Buckinghamshire in the years 1333–4 is the subject of a volume by G. H. Fowler published in 1929 for the Bedfordshire Historical Record Society. On this were entered over 2,000 Writs received by the Sheriff from the King's Courts with notes of the action taken.

single string or gut constitute at any given moment, if regularly kept, a summary of what is known to the Clerks of a Court about the present state of the cases which are, or are about to come, before it.

In the course of centuries there grows up an increasing quantity of subordinate and supplementary classes. Also, when we come to the end of the medieval period, there begins the ultimately vast accumulation of Equity Proceedings cast in new shapes—the *Bills and Answers, Depositions, Decrees and Orders* and so forth; modern forms, phrased in English, not bound by any medieval conventions and consequently not presenting the same problems to the reader of today. But the *Plea Roll*, the form typical of Common Law Records at every date down to the nineteenth century and in every variety of English Court,[12] from the Manorial to the King's Bench, Common Pleas or Exchequer, and its adjunct the file of *Writs and Returns*, are the two which supply the crucial problems confronting those who would understand and utilise English Legal Records.

Medieval Formalism.

It is an old paradox that the only way to be quite sure that one is reading a document correctly is to know in advance what is there : when one is reading a modern document one does, in fact, spell out to oneself *literatim* only a very small proportion of the written words : in the case of a vast majority one actually reads only a few letters, here and there, in each case; one's mind supplying automatically the whole word which the context requires. Naturally this mental process becomes much slower if the subject of the writing is one far removed from the ordinary life and practice of the reader: if, for example, he is trained only in the humanities he will have to spell out an abnormally large number of the words when he is attacking a technical treatise on a scientific subject. A similar difficulty assails the reader who is dealing with a document far removed from him not so much by its subject as by the period in which it was written; belonging in fact to a time when the names of everyday things and the point of view in regard to everyday happenings were quite different from what they are now. An essential preliminary, therefore, to the reading of medieval Legal Records is a knowledge which will enable the modern reader to put himself in the position of a medieval Lawyer or Clerk.

[12] The only exceptions are normally in the Records of Courts of post-medieval institution: the most notable being the *Sessions Roll* of Justices of the Peace, actually as a rule a combination of one long membrane and a file of Miscellanea.

In this connexion we have to remember two things. In the first place writing habits during the first two or three centuries with which we are dealing, at any rate the habits which governed the use of writing for business purposes, were conditioned by the fact that such writing was very rarely done, very rarely even read, by the principal concerned; that is to say, the person whose Orders were to be communicated, whose Revenue was to be accounted for, or who owned the Court the proceedings of which were to be noted. As a result there grew up an enormous number of *pro forma* documents, or clauses for documents of which varying combinations could be made; all designed for use, in an evergrowing number of set cases, by a subordinate staff. These documents and clauses even had nick-names and conventional abbreviations, generally derived from some salient word or an abbreviation of it: so that a Chancery Clerk in the fourteenth century would know at once what to do when he was instructed to make out *Letters Patent* 'with the Clause *licet*'; and (to take a more modern example) we find Mr. Perker talking to Mr. Pickwick about the *casa*.[13] It is possible for a person well versed in the diplomatic of the medieval Chancery to 'read' line after line of the *Charter Roll* with his eyes shut, after no more than a preliminary glance at two or three words: and in the case of the Law such practices (accentuated by a predisposition almost religious to exact *formulae* in its more ancient processes) were developed to perhaps their most remarkable extent; notably in the shape of the '*Writs of course*' (*de cursu*) that could be issued by the Chancery without specific Warrant, the development of which in ever increasing numbers marks the development of the Common Law.

The Copying Clerk.

Our second point is that in two out of the three great categories into which all Records fall[14] (the *Memoranda* category and the *Enrolment* or *Registration* category) the writer is not concerned with the requirements of any reader save himself or a few colleagues equally qualified to understand them; and therefore uses every possible device to save himself time and trouble. The most obvious of such devices is abbreviation; and the more the matter to be copied or registered consists of stock phrases, the more practicable does such abbreviation become. As a result, Legal Records, and in particular the most typical one, the *Plea Roll*, are crammed with

[13] Charles Dickens, *Pickwick Papers*, Chapter XXXIX: Mr. Perker apparently made one word of it, but it is of course two, *ca sa—capias ad satisfaciendum*.
[14] The third is that of Original Communications preserved by the recipient.

abbreviated phrases which presented no difficulty to the contemporary Legal Clerk but are not in the least understandable by the modern who has not trained himself specially. One of the commonest devices is to substitute for a Writ which ought to be quoted at length a few leading words, sufficient to identify it, in combination with a series of *etcs.*[15] : but there are many others and some much more difficult than the mere identification of a Writ.

The Diplomatic of the Plea Roll.

To this Diplomatic of the Law Courts there is at present no single Guide : nor can we attempt here to supply even a part of that omission. But it may be worth while to see something of the routine which goes to mould the most ordinary entry in a *Plea Roll* of one of the Central Courts. I exclude abnormals and special entries of matters other than pleadings, such as Appointments of Attorneys, Adjournments, Recognisances and Agreements. Apart from these, speaking generally, the same form may be found with astonishing uniformity in *Plea Rolls* of all kinds, not only in those of the Royal Courts but in Palatinate, Local and Private ones; though naturally in the last named classes small local variations may occur and the routine use of certain phrases in certain situations be slightly less inevitable. It must also be understood that we are concerned for the moment only with the explanation of surface difficulties : of the underlying problems we may have more to say later.

The proceedings, then, in a perfectly ordinary case, such as we may expect to find recorded in any medieval *Plea Roll*, may be divided into seven stages.

(i) The Plaintiff states his case and petitions for a remedy.
(ii) Instruction is given to a Local Official to produce the defendant; unless of course he is already present in Court.
(iii) Appearance (or non-appearance) of Plaintiff and Defendant.
(iv) Statements of Parties.
(v) Resultant action of Court.
(vi) Any further proceedings.
(vii) Decision and final action of the Court.

It will be understood, of course, that not all of these stages will necessarily be exemplified in every entry. For instance, once the number of Writs which can be issued *de cursu* by the Chancery becomes sufficiently large the first two stages become no more than

[15] For example in citation of a Writ of *distringas* the words *donec, etc.*, are enough to represent a whole clause—*donec aliud a nobis inde habueris preceptum.* The Clerk who wished to be even briefer would make a single abbreviation, *dis'*, stand for the whole Writ.

the purchase of the appropriate Writ and its despatch to the appropriate Local Official; and the first Record of these transactions is the appearance of the suit in the *Plea Roll* of the Court in which it is to be tried. On the other hand at stage (iii) there is a considerable variety of possible developments and, consequently, phraseology: both Plaintiff and Defendant may appear, or only the Plaintiff, or only the Defendant, or neither; and in the last three of these circumstances we shall not have stage (iv), nor (vi) nor (vii). There is also a large number of attendant circumstances which effect further subdivisions of these four possibilities: for example a Party may fail to appear for one of a number of accepted reasons, or may merely absent himself; and the result on stage (v) will be different in each case. The total of possible combinations of all possible developments at all seven stages, or at one or more of them, is the total of possible forms for the statement of proceedings in an ordinary action as they are set out on an ordinary *Plea Roll*: excepting always (and the exception is an important one) the *Marginalia* and Interlineations—the comments or notes added later either by the Clerk himself or by some other hand.

This indication of innumerable set forms may perhaps be at first intimidating: but a large number of the variations are merely different combinations of a few stock phrases which can be memorised without great difficulty; and in practice it will be found that once one has learned to orientate oneself, to decide at a glance to what stage of the proceedings any given passage belongs, the '*et habeat etc.*' and other problems of phraseology and abbreviation, if they do not solve themselves, at least suggest their own solution. The basis of interpretation is, in fact, no more than informed common sense: a large part of the required information being supplied by reference to either the *Original* or the *Judicial* section of the *Registrum Omnium Brevium*[16]; according as the required Writ is one from the Chancery, starting the action, or from the Court, continuing it.

The Diplomatic of Local Proceedings.

Local jurisdictions may give more trouble. The same principle holds: we are still to look for the origin of some at least of the formal *Plea Roll* phraseology in that of the original instruments—*Writs*, *Precepts* and so forth—employed either by the Court itself or by a superior Court[17] from which some order may proceed. But

[16] On this subject see Maitland's article in *Collected Papers*, Vol. II. The *Registrum* itself, however, it must be admitted, sometimes uses *etc.*

[17] For example the *re fa lo* (*recordari facias loquelam*) addressed by the Crown to a County Court and duly registered in its *Plea Roll.*

unfortunately little, save that they existed, is known of the formularies from which the Sheriff's Clerks worked in the office of the Medieval County Court or those from which the officials of the early Justices of the Peace [18] evolved the *Sessions Rolls*. We can only emphasise the importance of being on the watch for the survivals which will surely come to light ultimately in Private Muniment Rooms and elsewhere (Borough Muniments might prove a good hunting ground) and refer the Student to post-medieval treatises [19]; which, used with caution, may sometimes throw a light upon earlier practice.

The Diplomatic of Manorial and other Private Courts.

Coming to the Private Jurisdictions we find a change—of which indeed there has been already some indication in the Records of the Local Courts immediately above them—the change which results from the fact that the defendant is already, or is reckoned to be, in Court; so that no precept for his production is necessary; a circumstance which occurs only exceptionally in the Central Courts. But the principle of finding the formulary from which the Clerk worked still holds. The writers of Records for the Manorial and other small Courts must have been (however much we allow for grouped Manors [20]) very numerous and (making every possible exception in favour of the Manors held by Ecclesiastics) in a high proportion of cases very ignorant. Very little work has been done on this subject but there is no doubt, I think, that investigation will reveal a remarkable similarity in the way in which Stewards of widely separated properties, and presiding in Courts of many denominations,[21] dealt with their Suitors, Tithing-men, Bailiffs and so forth, and the language in which these relations are recorded: and the conclusion is fairly safe that they founded themselves on the treatises which (though few survivals have yet been noted)

[18] Miss Putnam has discovered and published (in *Oxford Studies in Social and Legal History*, Vol. VII (Oxford, 1924)) one medieval formulary compiled for the guidance of a Justice of the Peace in Worcestershire in the early fifteenth century.

[19] Miss Putnam (*op. cit.*) has compiled a list of no less than 57 new works or new editions of old ones, published between 1506 and 1599 for the enlightenment of Justices of the Peace. On the side of County Administration no such bibliography is available but the Student will find some indications in G. H. Fowler's *Sheriff's Roll*, already cited.

[20] It is important to remember here the number—well into five figures—of the medieval Manorial Courts.

[21] A good example of varying denominations is supplied by Macclesfield; which had a Hundred Court, Hallmotes of the Forest and of the Manor and Forest, Portmote and Great Leet of the Borough, Court of the Mayor, Swainmote of the Forest, and Court Leet of the Manor and Forest.

are known to have been available from a quite early date.[22] Later, when printing made their reproduction easy, there was a spate of treatises designed for the instruction of such Officials as well as for that of Justices of the Peace.[23]

The Added Note.

Of course, when all is said, we have to allow everywhere for the personal or local peculiarity, and it is in the notes added by the same or another hand after the original Clerk had drafted or made up [24] what has come down to us as the *Plea Roll*—in the *Marginalia* and Interlineations—that we shall find most difficulty. There are a few which occur with a frequency that precludes individualism : that invariable accompaniment of every stage of a plea, the Amercement of some one, is the obvious case in point; and it is safe to say that every *Plea Roll* Clerk in the Kingdom, whatever his Court, knew that an Amercement (*Misericordia*) should be margined '*mia*'. The use of the Medieval $\frac{c}{,}$ abbreviation (meaning *est*), in one or other of the numerous forms which current writing gave it,[25] is hardly less common : the most exact meaning one can attach to it is a note that the next step indicated by the text has been taken. But apart from these and one or two others, which may be learned by rote as of regular occurrence, the Student will once again need to look not to formal

[22] For example the thirteenth century treatise '*Cy poet vn juuenes homme ver Coment il deyt sotylement parler en Court*', printed by the Selden Society in *The Court Baron* (1890). This is known to exist in more than one copy : a new one, from which I take the above rendering of the title, was noted some years ago in a volume in the possession of Messrs. Sweet and Maxwell, who printed a translation of it.

[23] So far as I am aware there is no bibliography available but some of these treatises have been reprinted by the Manorial Society.

[24] Our earliest *Plea Rolls* (see, for example, that reproduced in Johnson and Jenkinson, *Court Hand Illustrated* (Oxford: 1915) Plate IX) were apparently written actually, as they purport to be, in Court : but the Clerks soon gave up the attempt to do this. Thereafter procedure varied. In some cases a draft was prepared beforehand with gaps left in it, perhaps, which might or might not be filled up in Court: in others (and this probably became more and more the normal way) the *Plea Roll* entry was written up subsequently from notes. See some account of procedure in the Common Bench in the late Miss Isobel Thornley's *Yearbooks, 11 Richard II* (Ames Foundation: 1937) and Margaret Hastings' *Court of Common Pleas* (New York: 1947).

Towards the end it would seem that in some of the Royal Courts the Attorneys in the case were responsible for making the 'enrolment', being supplied with a numbered 'membrane' which they were to write and send in for filing : but at what date this became the custom is a question not yet settled.

On the other hand we have in the fourteenth century *County Court Roll* for Bedfordshire (published by G. H. Fowler with his *Sheriff's Roll*) evidence that the notes on the roll of one Session were the basis of a draft, made beforehand, for next Session's proceedings. See an article in *English Historical Review*, Vol. XLIII, p. 21.

[25] For the history of this curious sign which appears (though often unrecognised) in the margin of *Plea Rolls* of every kind and date see my *Later Court Hands* (Cambridge: 1927), p. 92.

Palaeography or Diplomatic but to common sense backed by a knowledge of procedure for a solution of his problems. In some cases it will come more readily than in others. The prisoner to whose name we find added in the *Controlment Roll* of the King's Bench the note *Mar Sus* is at a stage in his career when (as a little reflection will convince us) nothing could happen to him save to be handed over to the custody of the *Mar*[*shal*] and soon after *sus*[*pensus per collum*] : whereas we may puzzle for some time over the plaintiff who is annotated *a p a* before we decide that (probably) *apparet per attornatum*, he appears by his Attorney. But, difficult or easy, these are problems of procedure rather than verbal or scribal form : and that fact, while it relieves Legal Diplomatic of a heavy burden, introduces us to a new difficulty.

The Progressive Puzzle.

If we look with a little more attention at almost any of the initial difficulties we may have had to solve when we first started to read Legal Records we shall find that the apparently successful solution in each case is really only the starting point of a fresh set of riddles. Let us take a few at random: for example we have seen (let us say) that *po lo* indicates that A B, party to an action at Law, appoints X Y his Attorney, the full phrase being *ponit loco suo ad lucrandum vel perdendum* : we have discovered that *ve ja* means *venire facias* and is the name of a Writ—sometimes that which bids a Sheriff to summon a Defendant and sometimes that which instructs him to impanel a Jury; and that if *M' Pas'* is written after it we are to know that the Writ is returnable at Easter Month: in a number of cases we have found that *op se* is an abbreviation for *optulit se* and an elliptical statement of the fact that someone 'offered himself on the fourth day of this Session': and we have noted that *j. m. cl'* in a particular position signified 'one mark for the Clerks'. Any one who has done a little reading of medieval *Plea Rolls* (or even the later *Sessions Rolls* of Justices of the Peace) could supply without difficulty quantities of abbreviated words and phrases like these; which were common form to the Clerks who wrote, and must become common form also to the Student who would read, the Records of the Law.

But now let us push matters a little further by propounding in each of these cases no more out-of-the-way query than may be summed up in the words '*What as a matter of fact occurred?*' With the aid of what is in the books, or (in a few cases) though not actually in print is matter of fairly common knowledge, we can add to what has just been said that the Attorney of whose appointment we spoke is one of the ancestors of the modern Solicitor, that

in the earlier part of our period he can be and often is an amateur, merely a friend of the person he presents, but that at the end of our period he is a professional, sworn for practice in a particular Court; that when we first meet him in Records there had to be specific Royal Licence for his appointment in each case; and that very early in our Record Series appointments of Attorneys were so numerous as to require a number of the membranes of the *Plea Roll* in every session of the Court of Common Pleas to be set aside exclusively for them. Of the *ve fa* for a Jury we need say no more at this stage than that it naturally became enormously more frequent in issue as the primitive methods of reaching a decision were gradually abandoned: but in regard to *op se* inquiry has gone far enough to enable us to add a good deal. We may note, for instance, that in the Records of Royal Courts (but not necessarily in Local ones), in every period save the earliest, the appearance of these words in the opening phrases of a case indicates, without necessity for any further research, that the Plaintiff had 'offered himself' but that *the Defendant was not there*—a useful short cut for the Student who desires to study only those cases which actually reached the stage of a hearing.[26] As to the 'mark for the Clerks' a careful quest in some rather obscure corners of Legal treatises will reveal that this is an example of 'damages clere', the payment of a proportion of the assessed damages not to the Plaintiff but to the Officials of the Court: to which most members of the small band of *Plea Roll* readers would probably add that they have very seldom (or, frankly, that they have never) come across it.

But the inquiring mind will hardly be satisfied with these modest additions to the knowledge conveyed by mere extension and transcription. Let us run through our illustrations once again in a little more detail.

Po Lo.

The history of the Attorney has been the subject of several books. Yet so soon as we begin to put that simple question 'what as a matter of fact occurred', or (to vary it a little) ask ourselves how far it is safe to assume that Z, described as the Attorney in a case of which we read in Records of the year 1272 (or 1472, or 1672), exercised the same functions, had, *mutatis mutandis*, the same training, occupied the same social position, kept office in a

[26] There is only one exception—the rare case where there are several Defendants of whom one at least has come and one at least has not.

like fashion, was paid in the same way as any professional Lawyer of our own time—was, in fact, in any or every way comparable with some Z of our acquaintance of the present day—so soon as we allow these not unnatural questions to come up in our minds, we discover that we lack the most elementary knowledge about him. Thus we find that in theory the party represented had personally to present his Attorney to the Court: well, did he? We may be tolerably certain that at certain periods and in certain circumstances he did not; because it was not possible: but what are those periods and circumstances? and anyhow when did the use of a professional Attorney become general? or obligatory? Again, how did a small farmer (say) in Devon, in the fourteenth century, who became involved in a lawsuit in London—how did he find himself an Attorney at Westminster? did he come up to town for the purpose? and if he did not how did he manage the formal appointment? and how notify it to the Court?[27] When we read that X Y, a Defendant, *venit et dicit* without any mention of an Attorney does it mean that he himself 'came and said'? not at some periods it is certain, but again—what are the periods? Then what about that *dicit*—does it mean that X Y really addressed the Court himself? or that his Attorney did? Probably either may be the case at given dates: but quite certainly there comes a time when they are not; or what would become of the *narrator*, the modern Barrister? These are only a few of the questions which, as I have said, suggest themselves so soon as one begins to try and give body to the person of whom one reads in the Record: in regard to some of them there is already a certain amount of information available in print; all, I think, are answerable: but emphatically there is at present no authority which can answer them for us as a whole: and with equal emphasis I would say that until we can answer them we do not really know anything about the person of whom we write and talk so glibly and therefore cannot be sure that we are understanding the passages in which he figures.

Ve fa.

Take, again, that matter of the summoning of a Jury. We know what in our own day the jury system means in the life of the ordinary citizen—what members of the Community are affected by it, how they are summoned to duty, in what circumstances they may secure exemption, how they are compensated for personal loss

[27] There is a certain amount of known evidence on this point. For example Justices and many other Royal Officials who for one reason or another habitually perambulated the Kingdom were empowered to receive formally, or acquired the habit of receiving, appointments of Attorneys and certifying them to the Courts concerned: no doubt in return for a suitable fee.

which the duty may entail, how they discharge the duty: all this knowledge is at the back of our minds, or at least available for us, when we speak of a Juryman: and we know that the present state of affairs has evolved gradually from an earlier one to which our Records refer. But what do we know of the Juryman of the reign of Edward I? or of intervening dates between that and our own time? How, in an age of no Directories, no Public Conveyances and very bad Roads, did a Sheriff select and (an even more important question in some cases) how did he exempt his men and, in answer to a King's Bench Writ, bring a Jury from some distant County *coram Rege ubicunque tunc fuerit*? how did they, or someone for them, find out where the Court was? to whom did they report when they got there? how were they fed? who paid their expenses? And (inevitable corollary to awkward questions such as these) is it possible that in certain circumstances formal statements that a number of persons (named) 'say upon their oath' are not to be taken too literally? is it even possible (we know that in slightly different circumstances an alleged sworn statement of a most categorical kind may prove to be neither more nor less than an elaborate fiction [28])—is it possible that the Sheriff, faced with the difficulties we have suggested sometimes provided the required 'inquisition' [29] by some less difficult means?

I have omitted not a few of the questions which arise in connexion with this most ordinary of Writs and its multitudinous brethren—I have said nothing, for example, of the Court end of the story, of the problems connected with the writing, recording, sealing and dispatch of the endless series of Writs and of their handling by the Clerks on their return. For many years they were regarded as practically valueless—a burden of which the Record Office might well rid itself [30]: but there is no doubt (though investigation has hardly begun) that at certain periods they were administratively of more importance than the *Plea Roll*.

Op se.

Put simply the use of this gambit means, as we have said, that the Defendant, or one at least of a number of defendants, has failed to appear; that a fresh Writ will have to be issued; and

[28] See an article by R. C. Fowler in *English Historical Review*, Vol. XXII, p. 101, and further notes by Miss M. T. Martin, *ibid.*, Vol. XXII, p. 526; A. E. Stamp, *ibid.*, Vol. XXIX, p. 323, and Miss Elsie Toms, *ibid.*, Vol. LI, p. 268: and cp. C. G. Crump in *John Rylands Bulletin*, VIII, p. 140.

[29] It is to be remembered that many of these findings are in the nature rather of presentments than of what we should call verdicts—statements by persons who were in a position to know the facts, not judgments of the value of evidence.

[30] It is only within comparatively recent years that the process of removing them from bulk storage in sacks has been begun.

incidentally, for most Students, that there is nothing to be gained by reading the remainder of that entry on the *Plea Roll*. But the Student of *Plea Rolls* of (say) the later thirteenth century, even if he decides to give all such entries a miss, can hardly fail to be struck by the number of them. In some instances, he will discover (if he pushes investigation further), a reason is given—the Sheriff received the Writ too late, or the person named cannot be found in his Bailiwick or lives in a Liberty—but in a very large number there is none: the Defendant has just chosen not to appear. What does this mean? Our Student will find that in one Court at least, for a time, this flouting of the initial Summons was so habitual, and the consequent crop of *op se* entries so enormous, that the Clerks took to omitting them from the *Plea Roll*; thus giving rise, by the way, to the fresh question, how they themselves kept track of the business of their Court. He may discover also that in the end a stage was reached where the initial summons in a case was so invariably disregarded that it became the custom to issue simultaneously with the Writs of Summons the Writs of Distraint which form nominally a subsequent stage in the action.

But here again we have gone only a little way along the path of enquiry that this singular practice opens to us. We have yet to obtain knowledge of such elementary and fundamental matters as the different dates at which the note in our Records of the issue of an initial summons, with all its paraphernalia of Mainpernors, and the solemn ' return ' of it by the Sheriff and the non-appearance of the Defendant,

(a) means more or less what it says;
(b) is of doubtful interpretation; and
(c) definitely means nothing, except (presumably) that formal amercements of Defendant and his alleged Mainpernors were automatically debited for payment by the Attorney of one of the Parties.

Even when we are in a position to speak with certainty on these points we shall still not have touched another series of almost equally obvious problems. We shall find ourselves asking what proportion of these *op se* entries ever appear in the roll again? and in the case of those (I suspect a very large proportion) of which no more is heard, whether this is due to a singularly general carelessness on the part of the *Plea Roll* clerks? or to some intricacy of procedure which we have not mastered? and, failing these, what can have been the motive which induced people to go to Law without (apparently) any considerable intention or hope of securing an issue? and why or by what particular form of irregularity the

Court allowed all these cases to lapse? Until we are able to answer these questions, and others like them, and to answer them in respect of varying dates over a period of six centuries, we are not in a position to read the Records with intelligence or extract their significance with certainty.

Damages Clere.

In regard to these there are four things to be said initially. In the first place the custom seems to have been very wide-spread: I have found examples in the Records of the King's Bench, the Exchequer and the Common Pleas, even in the Court of the Verge, and in a Local (Hundred) Court. On the other hand these examples are exceedingly sparse: I do not think I have seen more than twenty or thirty, all told. Thirdly there seems no fixed rate at which, when these damages are allowed, they are calculated: they may be anything from the whole of the damages awarded down to a comparatively small proportion. And fourthly I have been unable to find, either in the individual peculiarities of the cases concerned or in any common characteristic which distinguishes them from other actions for damages, the reason why damages clere were awarded at all.

Quite a crop of comment and query follows. Obviously if the granting of a proportion of damages to the Clerks was common we have here part of the answer to a question which must puzzle any one who considers the administration of our Law Courts in the past—the question how it was (since we find hardly any trace of their being paid a salary) that there was never any lack of Clerks in the innumerable Courts, large and small, scattered up and down the Kingdom: we have added in fact a new possibility of profit (with a rather fascinating uncertainty as to the amount of the prizes) to that general body of fee-paying which is one of the distinctive characteristics of medieval administration. The entries, once they have been seen a few times, become so easy to look for [31] that one is tempted to hope a few Students may one day be found who will undertake to hunt for them systematically through a considerable body of Records of all categories and all periods: the tabulated results, especially if they could be expanded not only by a comparison of the proportions of the damages allocated in this way under varying circumstances and at different times but also by an analysis of the types of case in which they appeared, might throw more light on the origin of this logical but none the

[31] All those I have seen were added in a small hand in the space at the end of an entry on the *Plea Roll* or in the margin at the same point.

less astonishing development of the Fee system, its incidence, growth and continuity. That apart, there seems little chance of our enlightenment unless we are fortunate enough (it is not an impossible contingency, at any rate for the later part of our period) to discover the private Accounts of a few Clerks employed in various Courts.

The reason for the sparseness and irregularity of the entries (or rather notes) of Damages Clere in the Rolls may, I think, be suggested with some certainty. The form in which a plea is entered became fixed very early : we can watch its development out of the tentative stage during the first part of the thirteenth century. The form then reached changes thereafter comparatively little save in the swelling of its bulk; and its purpose is equally well defined—it serves as a record of the state the case had reached when it was last in Court and as evidence of (and warrant for [32]) the action, in the way of further Writs and so forth, which was ordered by the Court and taken by the Clerks. Any notes added to this formal Record (marginally, or between the lines, or in the space at the end of an entry) are equally defined in their nature and purpose : they serve (as we have seen) either to provide a draft for a fresh entry of the same case in a subsequent Record or to dispense the Clerk from making any subsequent entry at all and bring everything conveniently together in one place; or (a third possibility) they enable the Clerk to make up an ' Estreat ' of the Amercements which the Financial Department will have to collect. The last is, of course, very common,[33] for the medieval Court, it is important to remember, is always a property which is expected to shew a profit. In none of these considerations, not even in the last, is there anything to suggest or enforce the making of an entry concerning these damages; which would have no interest for the owners of either the Court or the Roll—the Lord or the Justice [34] : the Clerks are the sole persons interested and they could jot down their private notes more conveniently elsewhere.

[32] The development of a practice of adding, in the bottom righthand corner of a ' Judicial ' Writ, a reference to the membrane of the *Plea Roll* where the Court's order for its issue is recorded is interesting evidence on this point. In the case of an ' Original ' Writ out of the Chancery the name of the Cursitor who issued it will be given in the same place. See some examples in Plate XLI of my *Later Court Hands*.

[33] It includes not only the well-known *mia* (*misericordia*) in the margin but the almost equally common addition between lines or in the margin of small notes such as *iiij.d.* indicating the amount of an amercement.

[34] In the case at any rate of the Royal Courts it is very clear that each *Plea Roll* is regarded primarily as belonging to a particular Justice, though after the lapse of a certain time he may be expected to deliver it up for permanent preservation as a Record.

Conclusion.

There is not space here to deal at length with the question how far the slight embroidery which I have attempted upon Maitland's first proposition, touching the study of Legal Records by persons trained in the Law, may affect his second—that which dealt with the incredible richness of these Records and the desirability of making them available for Students of all kinds. But I will hazard a summary statement.

It should be generally recognised by now—it must be by any person who has made a comprehensive survey of surviving Legal Records [35] and of the respectable number of volumes which have succeeded in publishing only a minute portion of them during the last fifty years—that there is no hope of making even a fraction of one per cent. of them generally available by means of a straight publication of texts : nor can the Selden Society's admirable volumes of Selections do anything to meet the demand. Those who wish to exploit this wealth must in nearly all cases be prepared to do their own digging. But is there no feasible scheme for a comprehensive piece of work which would cover within reasonable time the whole field and would do something at least to facilitate and make more sure the labours of those who may go mining hereafter? I think there is.

In this article I have tried to indicate that there are numerous problems of form and procedure which until they are solved—and solved in relation to all periods—must make it impossible alike for Legal and for other Students to use these Records with any certainty that they are extracting from them their full and true significance. Is it impossible to envisage the creation of a School of Workers (Legal History is now a recognised element in Legal training) who should devote themselves to exploring in turn every category of Legal Records at intervals of, say, fifty years from the thirteenth to the eighteenth century with the express object not of making available their contents but of clearing up every problem of form, procedure and significance which they may present? That will be found, I suggest, to be a not impossible programme : but we come back to Maitland's conclusion—it is Lawyers' work (though the result would be a key which all could use) and it is for the Lawyers to say whether it shall be attempted.

[35] Of *Plea Rolls* alone the Public Record Office contains over 17,000 drawn from more than 20 Courts : this is without counting the Manorial.

ULTERIOR LIMITATIONS AND THE RULE AGAINST PERPETUITIES

J. H. C. Morris

The purpose of this article is to consider whether, and if so to what extent, a limitation following one which is void for remoteness is itself void. The subject is one of the most obscure in the rule against perpetuities, and it has always seemed to me that the well-known monographs are at their least satisfactory on this topic. Although I have no desire to revive old controversies, it will not be possible to avoid occasional references to such controversial matters as the rule in *Whitby* v. *Mitchell*,[1] the application of the modern rule against perpetuities to legal contingent remainders, and the scope of the *cy-près* doctrine.

Although they fall short of being unanimous, the weight of opinion among text-writers is that limitations following limitations void for remoteness are void.[2] Gray was of the contrary opinion: but his learned editor, while preserving some of Gray's arguments, now says that the ulterior limitation is void.[3] His reason is that in a limitation (1) to A for life, (2) to A's unborn child for life, (3) to the child of such unborn child for life, (4) to B in fee, B's estate is not vested but contingent; it takes effect at too remote a period, and so is void. 'The estate to B is subject to the conditions precedent of (1) the death of A, (2) the death of A's unborn child, (3) the death of the child of A's unborn child.' It is submitted, however, that this is to give an entirely new meaning to the word 'vested', and that it is inconsistent not only with Fearne's

[1] (1890) 44 Ch.D. 85.

[2] *Bailey on Wills*, p. 157; *Challis on Real Property*, p. 192; Cheshire, *Modern Law of Real Property*, p. 486; *Farwell on Powers*, p. 341; *Godefroi on Trusts*, p. 651; *Goodeve and Potter on Real Property*, p. 377; *Gray on Perpetuities*, s. 251; *Halsbury's Laws of England*, vol. 25, p. 147; Leach, 51 Harv.L.Rev. 657; *Marsden on Perpetuities*, pp. 288–94; Radcliffe, *Real Property Law*, p. 123; and Rivington, *Law of Property in Land*, pp. 170–1, treat the ulterior limitation as void. Some of these authors wrote before 1936 when the rule (if it exists) was much modified: see *post*, p. 406. *Keeton on Trusts*, p. 112, and *Theobald on Wills*, pp. 416–7, hedge. *Jarman on Wills*, pp. 324–9, especially p. 327 note (*e*); *Lewis on Perpetuities*, pp. 660–2; Megarry, *Manual of Real Property Law*, p. 152 (cf. 60 L.Q.R. 297–8) and Potter, 53 L.Q.R. 13, concede that in certain circumstances the ulterior limitation may be valid. But Jarman does not cite *Re Backhouse* [1921] 2 Ch. 51 on this point (see *post*, p. 406); Lewis cites *Beard* v. *Westcott* (1813) 5 Taunt. 393 in the Common Pleas, but unaccountably fails to cite the contrary decisions in the same case in the King's Bench and in Chancery (see *post*, pp. 399–400).

[3] *Perpetuities*, ss. 251, 257.

classic definition of a vested interest,[4] but also with an earlier passage in Gray[5] where the distinction between vested and contingent remainders is thus expressed : ' A remainder is vested in A when, throughout its continuance, A, or A and his heirs, have the right to the immediate possession, whenever *and however* the preceding freehold estates may determine. A remainder is contingent if, in order for it to come into possession, the fulfilment of some condition precedent *other than the determination of the preceding freehold estates* is necessary ' (emphasis supplied). In Gray's example, surely B has the right to the immediate possession as soon as the preceding estates cease to stand in the way : and they may cease to stand in the way either because A never has a child or a grandchild or because they are void for remoteness. It is hardly surprising that a learned reviewer[6] of Gray remarked that ' the spectacle of such an interest being treated as contingent by an authority such as Gray serves merely to emphasise the complexity of the subject '. One differs from Gray in fear and trembling on any point connected with the rule against perpetuities; but henceforth in this article it will be assumed that an interest like that of B's in the example given above is vested.

In order to bring the question for discussion into the sharpest possible focus, it is necessary at the outset to distinguish between two classes of case :

(a) Where the ulterior limitation is dependent upon the same contingency as the prior limitation.

(b) Where the ulterior limitation is vested, or must vest in interest within the perpetuity period. There is no difference for our purposes between the two kinds of limitation included under this head, for intrinsically they are neither of them too remote, and if they are held invalid it can only be because of the invalidity of the prior limitations.

This distinction, though important, does not appear to be drawn in many of the discussions of the subject, with the result that some cases are cited for propositions which they do not support, and a misleading impression is given of the state of the authorities. We shall see that in case (a) the invalidity of the ulterior limitation is amply supported by authority. But in case (b), incredible though it may appear, the only authorities for holding the ulterior

[4] ' The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent ' (*Contingent Remainders*, p. 216).

[5] Section 101.

[6] R. E. Megarry in 60 L.Q.R. 298 (1944).

limitation void are one solitary decision [7] by Eve J. in 1919; a dictum [8] by Stirling J. in 1893; a dictum [9] by Lord St. Leonards in 1852; and a dictum [10] by Lord St. Leonards (when counsel) in 1822.

(A) Cases Where the Ulterior Limitation is Dependent Upon the Same Contingency as the Prior Limitation

In such cases it is obvious that the ulterior limitation will be void, because it is dependent upon a contingency which is too remote. Thus, in *Proctor* v. *Bishop of Bath and Wells*,[11] an advowson was devised to the first son of A to be bred a clergyman in the Church of England (obviously too remote), '*but if he have no such son*', to B: though B was a living person, the gift to him was not vested but contingent upon the same remote event as the prior gift, and was therefore void. The same rule applies, apparently, if the ulterior limitation is a life interest to a living person.[12] Thus, in *Re Hewett's Settlement*,[13] property was given by antenuptial settlement upon trust after the death of the husband and wife for all the children of the marriage who should attain twenty-five, 'and if there should be no child of the marriage who should attain twenty-five', then upon trust to pay the income equally to the husband's three sisters (named) for their lives. It was held that as the gift to the children at twenty-five was obviously too remote, the gift over to the sisters was also void. Gray argues that as all life interests must take effect, if at all, within lives in being, all such interests ought to be good.[14] Gray's reasoning has been described by high authority as unanswerable [15]; but the English cases which establish the opposite view are probably too well settled now to be overruled.

If there is a gift over on an event which includes within itself two events, only one of which is too remote, and the other event happens, the gift over will take effect, provided the testator has himself split the gift over into its two constituent parts, but not

[7] *Re Backhouse* [1921] 2 Ch. 51; discussed, *post*, p. 406; not cited as an authority for this proposition in *Jarman on Wills*.
[8] *Re Abbott* [1893] 1 Ch. 54, 57; cited, *post*, pp. 395–396.
[9] *Monypenny* v. *Dering* (1852) 2 D.M. & G. 145, 182; cited. *post*. 402.
[10] *Beard* v. *Westcott* (1822) 5 B. & Ald. 801, 810; cited, *post*, p. 399.
[11] (1794) 2 H.Bl. 358. Illustrations of the application of this principle are very numerous. The latest is *Re Hooper* [1948] 2 All E.R. 261; not reported on this point in [1948] Ch. 586.
[12] *Beard* v. *Westcott* (1822) 5 B. & Ald. 801; T. & R. 25; *Re Thatcher's Trusts* (1858) 26 Beav. 365; *Re Hewett's Settlement* [1915] 1 Ch. 810; *Re Ramadge's Settlement* [1919] 1 Ir.R. 205.
[13] [1915] 1 Ch. 810.
[14] *Perpetuities*, s. 252.
[15] *Jarman on Wills*, p. 356; cf. *Re Norton* [1911] 2 Ch. 27, 37–8.

otherwise. Thus, in *Proctor* v. *Bishop of Bath and Wells*, if A had had sons it might have been necessary to wait till the last of them died to see if any of them would take Holy Orders, and as they were not lives in being, the event was too remote. But A had no sons at all, and it was plausibly argued that it was ascertainable on A's death, and therefore within the perpetuity period, that none of his sons would take Holy Orders. But this argument was rejected, because the testator had not split the gift over, and it would have meant re-writing his will for the court to do it for him. If he had said 'but if he have no such son, *or if he have no son*, to B', the gift over would have been valid.[16]

(B) Cases Where the Ulterior Limitation is Vested

The authorities discussed in the preceding section do not touch the question whether a *vested* limitation is void if it follows a limitation which is too remote. Clearly there is a difference between a limitation to A for life, remainder to his grandchildren in fee simple, but if he has no grandchildren, to B in fee simple : and a limitation to A for life, remainder to his grandchildren for their lives, remainder to B in fee simple. In the first case the limitation to B is contingent, in the second it is vested. Now, if principle has anything to do with the question, the answer is not far to seek. The rule against perpetuities applies to limitations which may conceivably vest at too remote a date; it has nothing to do with vested limitations : therefore the ulterior vested limitation should be valid.

In *Re Abbott*,[17] however, Stirling J. said: 'It is settled that any limitation depending or[18] expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted : and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under

[16] *Loughead* v. *Phelps* (1770) 2 W.Bl. 704; *Miles* v. *Harford* (1879) 12 Ch.D. 691, 702; *Re Curryer* [1938] Ch. 952. To the rule that if the testator has not split the gift over, the court will not split it for him, there was before 1926 an exception if the gift over might take effect as a legal contingent remainder : *Evers* v. *Challis* (1859) 7 H. L. C. 531.

[17] [1893] 1 Ch. 54, 57. The authorities cited by the learned judge are a dictum of Buller J. in *Robinson* v. *Hardcastle* (1788) 2 T.R. 241, 251 (cited *post*, p. 397); *Routledge* v. *Dorril* (1794) 2 Ves. 357 (discussed *post*, p. 397); *Beard* v. *Westcott* (1822) 5 B. & Ald. 801; (1822) T. & R. 25 (discussed *post*, pp. 398–340); and the comments of Lord St. Leonards on *Beard* v. *Westcott* in *Monypenny* v. *Dering* (1852) 2 D.M. & G. 145, 181, 182 (cited and discussed *post*, p. 402).

[18] In *Re Coleman* [1936] Ch. 528, 532, it was suggested by counsel that the learned judge must have meant 'and'.

the subsequent limitation'. These remarks were only dicta, because it was held that the ulterior limitation was not depending or expectant on the void prior limitation and was therefore valid.[19] But the dicta are important because they contain the solitary judicial attempt to rationalise the supposed rule. It is submitted that the reasons given by the learned judge will not stand analysis.

In the first place, as Gray points out,[20] it seems quite artificial to base the rule on the hypothetical intentions of the settlor, because no rational settlor could ever intend anything of the sort. Consider our former example: a residuary devise to A for life, remainder to his grandchildren for their lives, remainder to B in fee simple. Suppose the testator is told: 'Your limitation to the grandchildren of A is void and cannot take effect. Do you wish the property to go to B on A's death? Or do you wish it to go to your next-of-kin?' Is it conceivable that any testator, confronted by such a question, would reply: 'I prefer to die intestate'?

In the second place, the reason proves too much, for it would strike at limitations following limitations which are void for other reasons than remoteness, whereas it is well settled that such ulterior limitations are not void at all but are accelerated. Suppose that the testator gives property to A for life and after his death to B absolutely. Suppose that the life estate given to A fails, for example because A witnesses the will, or because A disclaims. In each of these cases it is well settled that the ulterior gift to B is accelerated and does not fail.[21] Yet in each case it is true that 'the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted, and . . . the prior limitation . . . can never come into operation, much less be exhausted'. Why does not the doctrine of acceleration apply to cases where the prior limitation is void for remoteness? Why does the law treat a gift void for remoteness with greater severity than a gift void under section 15 of the Wills Act, 1837? It is believed that the courts have given no satisfactory answers to these questions, but have assumed without adequate discussion that the doctrine of acceleration, so well established in the one case, does not apply in the other. In order to demonstrate the truth of this statement it is proposed to examine the authorities in some detail, though the reader is warned that the facts of some of them are repellently complex.

[19] See *post*, p. 406.
[20] *Perpetuities*, s. 254.
[21] *Theobald on Wills*, 564–5; *Jarman on Wills*, 700–10; and cases there cited. The rule can be traced back to Y.B. 9 Henry VI, fo. 24 b. See also *Rolle's Abridgement*, tit. Remainder, C.4.5; *Plowden* 414; *Perkins*, s. 567; *Sheppard Touchstone* 435, 451; Strange 318; 1 Salk. 229.

Cases Prior to Beard *v.* Westcott [22]

Gray says [23] 'the doctrine that a vested limitation . . . is void if it follows an interest which is too remote cannot be traced clearly beyond *Beard* v. *Westcott*'. In order to convince the reader that Gray's statement is true, I propose to analyse the earlier cases shortly and to submit some observations on them.

In *Robinson* v. *Hardcastle* [24] the testator in exercise of a power to appoint among his children conferred by his marriage settlement appointed by will to his son James for life, remainder to the first and other sons of the body of James in tail, remainder to the daughters of James in tail, and in default of such issue to the use of the testator's daughter Elizabeth in fee. The Court of King's Bench certified on a case from Chancery that the limitations to James' sons and daughters were void and that the gift over to Elizabeth could not be accelerated, with the result that James took an estate tail as in default of appointment. During the course of the argument Buller J. observed [25] 'that if a subsequent limitation depended upon a prior estate which was void, the subsequent one must fall together with it; if indeed the subsequent limitation was not dependent upon the other, it might then take place notwithstanding the first was bad'. But there seems to have been no authority for this observation.

In *Routledge* v. *Dorril* [26] the testatrix in exercise of a power to appoint among her issue conferred by her marriage settlement appointed by will to a daughter for life, and after her death to her children equally, and if there should be no children, to the testatrix' other children absolutely. It was held by Lord Alvanley M.R. that the appointment to the grandchildren was void and that the ultimate gift to the testatrix' children could not be accelerated, with the result that the fund went as in default of appointment.

In *Brudenell* v. *Elwes* [27] the testatrix in exercise of a power to appoint among her children conferred by her marriage settlement appointed by deed to the use of her daughter for life, and after her death to the use of an elder son for life, remainder to his first and other sons in tail, remainder to a younger son for life, remainder to his first and other sons in tail, remainder to the use of the daughter in fee simple. The Court of King's Bench certified on a case from Chancery that all the limitations subsequent to that for the elder

[22] (1813) 5 Taunt. 393; (1822) 5 B. & Ald. 801; (1822) T. & R. 25.
[23] *Perpetuities*, s. 257.
[24] (1788) 2 T.R. 241, 380, 781; 2 Bro.C.C. 22, 344.
[25] 2 T.R. 251.
[26] (1794) 2 Ves. 357.
[27] (1801) 1 East 442.

son for life were void, including the ultimate limitation to the daughter in fee simple, which could not be accelerated.

These cases afford only the most tenuous support for the proposition that limitations dependent and expectant on limitations void for remoteness are themselves void. In *Robinson* v. *Hardcastle* and *Brudenell* v. *Elwes* the limitations to the grandchildren were void not only because they were too remote but also because the grandchildren were not objects of the power. And of all three cases, it is sufficient to say that the doctrine of acceleration (by which alone the ulterior limitations could be supported) does not apply to appointments under powers.[28]

Beard *v.* Westcott [29]

The real story begins with *Beard* v. *Westcott*, which was argued several times by Sugden on one side and Preston on the other; ultimately Sugden's arguments carried the day, but when these two celebrated real property lawyers met again in *Cadell* v. *Palmer*,[30] Preston was the victor.

The testator gave freeholds and long leaseholds unto and to the use of trustees upon trust for A for ninety-nine years if he should so long live, and after his death upon trust for A's eldest son (unborn at the testator's death) for ninety-nine years if he should so long live, and so on in tail male to such first son lawfully issuing for ever; 'and in case there should be no issue male of A at the time of his death, or in case there should be such issue male at that time and they should all die' under twenty-one without issue male, upon trust for B for ninety-nine years if he should so long live, with similar limitations for his issue. The question was the validity of the gift over to B, and two objections were taken to it: first, that it was too remote in itself; secondly, that even if not too remote in itself, it was expectant and dependent upon limitations to the grandsons of A which were obviously too remote. In connection with the first argument it is important to remember that not until *Cadell* v. *Palmer* [30] was it clearly established that the period of twenty-one years allowed by the rule against perpetuities could be a period in gross without reference to the minority of persons taking under the will; so that although the intrinsic validity of the gift over would be clear enough today, it was not clear when *Beard* v. *Westcott* was being argued. The sheet anchor of the

[28] *Crozier* v. *Crozier* (1843) 3 Dr. & War. 373; *Re Shekleton's Trusts* [1945] Ir.R. 115; see a note in 10 Conveyancer (N.S.) 61 (1945). In *Brudenell* v. *Elwes* the limitation to the testatrix' unborn grandsons in tail was void under the old rule against perpetuities, not the modern rule.

[29] (1813) 5 Taunt. 393; (1822) 5 B. & Ald. 801; (1822) T. & R. 25.

[30] (1833) 1 Cl. & F. 372.

argument on this point was a dictum of Lord Alvanley M.R. in the then recent case of *Thellusson* v. *Woodford*.[31]

The Court of Common Pleas certified on two cases from Chancery that A and his eldest son took successive estates for ninety-nine years if they should so long live, but that if A had no issue male living at his death, or if such issue male should die under twenty-one without issue male, the gift over to B would take effect.[32] The court therefore rejected the argument against the validity of the gift over on both points.

The Court of King's Bench on the other hand certified on another case from Chancery that the gift over to B would not take effect.[33] The court must therefore have accepted one or other of Sugden's arguments, but it is impossible to tell upon which ground the decision proceeded, for as these were both cases from Chancery, we have only the certificates of the judges and no reasons for judgment.[34]

On the equity reserved Lord Eldon confirmed the certificate of the Court of King's Bench without delivering a reasoned judgment of his own, so that we still do not know the real grounds for the decision. If the decision proceeded on the first ground, it was of course inconsistent with, and must be taken to have been overruled by, the later case of *Cadell* v. *Palmer*.[35] Moreover, Lord Eldon could hardly have been more hesitant in announcing his decision. 'The inclination of my opinion', he said,[36] 'is that the Court of King's Bench is right.' And he positively invited an appeal to the House of Lords: 'Under the circumstances of this case, I think the best thing I can do is to confirm it (the King's Bench certificate), and thus to help the case to the House of Lords if the parties think it right to take it there'.

In the course of his argument before the Court of King's Bench, Sugden enunciated the following proposition[37]: 'It may be laid down as a general rule, that where a preceding particular estate is void on account of a perpetuity, the remainders dependent upon it are also void'. This proposition of Sir Edward Sugden's is the *fons et origo* of the rule discussed in this article, but as we have

31 (1797) 4 Ves. 227, 337.
32 (1813) 5 Taunt. 393.
33 (1822) 5 B. & Ald. 801.
34 See, however, the remarks of Bayley J. (who had signed the certificate in *Beard* v. *Westcott*) in *Cadell* v. *Palmer* (1833) 1 Cl. & F. 372, 420, where he treats *Beard* v. *Westcott* as having proceeded upon the second ground. On the other hand, Sugden argued that it had proceeded on the first ground: 1 Cl. & F. 394–5, 408–9. He seems to have changed his mind in *Monypenny* v. *Dering* (1852) 2 D.M. & G. 145, 182: see *post*, p. 402.
35 (1833) 1 Cl. & F. 372.
36 T. & R. 26.
37 5 B. & Ald. 810

seen, it rested on no reliable basis of authority. Moreover, in spite of the eminence of the counsel and judges concerned, the case of *Beard* v. *Westcott* cannot be regarded as of very high authority, for the Courts of Common Pleas and King's Bench came to diametrically opposite conclusions; Lord Eldon was hesitant in confirming the King's Bench certificate; no reasons were given by any of the judges; and the certificate may have proceeded on a ground which is no longer tenable since *Cadell* v. *Palmer*.

Monypenny *v.* Dering [38]

This celebrated case is a leading authority on the *cy-près* doctrine and on the doctrine of splitting the gift over. It is regarded by most writers (but not by Gray) as a leading authority on the rule discussed in this article. It is therefore necessary to discuss it rather fully, though the facts and arguments were complex. A testator who died in 1822 devised gavelkind lands unto and to the use of trustees and their heirs upon trust (i) for A for life, (ii) and after his death for the first son of his body for life, (iii) and after his death for the first son of the body of such first son in tail male, (iv) and in default of such issue for the other sons of the body of A successively for the like interests as before directed respecting the first son and his issue, (v) 'and in default of issue of the body of A, or in case of his not leaving any at his decease, upon trust for' B for life, (vi) and after his death for the first son of his body in tail male, (vii) with remainders over.[39] A died in 1841 without having had any issue. Although the will only gave him a life estate in express words, A had purported to suffer a recovery in 1827 and had devised the lands to some of the defendants. The plaintiff was the first son of the body of B, and he claimed to be entitled in the events which had happened to an equitable estate tail in possession.

It will be observed first, that all the beneficial limitations in the will were equitable, the legal fee being vested in the trustees [40]; secondly, that there was a gap in the limitations, in that no estates were given to second and other sons of the eldest son of A; and thirdly, that the limitation in clause (iii) to the grandson of A in tail was obviously void for remoteness both under the old and the modern rules against perpetuities.

[38] (1847) 16 M. & W. 418; (1850) 7 Ha. 568; (1852) 2 De G.M. & G. 145.

[39] The facts stated above omit the complications caused by certain shifting clauses, which do not affect the question of remoteness; and the limitations have been numbered for convenience.

[40] 7 Ha. 575; 2 De G.M. & G. 169.

There were three classes of claimants[41]: (1) the plaintiff, claiming under the gift over in clause (v) of the will; (2) the devisees under the will of A; (3) the gavelkind heirs of the original testator. (1) The plaintiff argued his case in two ways. (a) First he said that an estate tail male ought to be implied in favour of the eldest son of A under the *cy-près* doctrine, with the result that none of the subsequent limitations would be too remote. (b) Secondly, he argued that the gift over in clause (v) was expressed in two alternative events, one of which (in case of A not leaving any issue at his death) was not too remote, and that that event was the one which had happened.[42] (2) The devisees under the will of A of course had to establish that A took an estate tail under the will and not a mere life estate, for otherwise the recovery of 1827 was nugatory. Their argument was also put in two ways. (a) First they said that A himself took an estate tail male by implication under the *cy-près* doctrine. (b) Secondly, they said that A took an estate tail male by implication from the gift over in default of male issue (the testator having died before section 29 of the Wills Act, 1837, became law), subject to open and let in the estates which were limited expressly to his male issue.[43] (3) The argument for the gavelkind heirs was that the limitation in clause (iii) and all subsequent limitations were void for remoteness, with the result that there was an intestacy after the death of A.

After the case had been argued no less than six times,[44] Lord St. Leonards held,[45] affirming the decision of Wigram V.-C.[46] and confirming the certificate of the Court of Common Pleas,[47] that A took a life estate only, but that B's eldest son (the plaintiff) took an estate tail in the event which had happened of A dying without leaving any issue at his decease. The first argument for the plaintiff was rejected on the ground that to imply an estate tail male for the eldest son of A under the *cy-près* doctrine would be to include persons whom the testator intended to exclude, namely, the second and other sons of the first son of A.[48] The first argument for the devisees under A's will, that A himself took an estate

[41] 16 M. & W. 426–7; 7 Ha. 582.
[42] This argument was not pressed in the Court of Exchequer, though the point is mentioned in the judgment: 7 Ha. 577, 584, 598; 16 M. & W. 436–7.
[43] 7 Ha. 585–6.
[44] Three times before Wigram V.-C., once before the Court of Exchequer, once before the Court of Common Pleas and once before the Lord Chancellor (St. Leonards). Even so the final decree was pronounced less than ten years after the institution of the suit: quick work in those days.
[45] 2 De G.M. & G. 145.
[46] 7 Ha. 568.
[47] The certificate of the Court of Exchequer only differed from that of the Court of Common Pleas on the effect of the alternative expression in the gift over, a point that had not been fully argued before the former court.
[48] 16 M. & W. 436; 7 Ha. 588–95; 2 D.M. & G. 176.

tail under the *cy-près* doctrine, was rejected on similar grounds. The second argument for the devisees, that A took an estate tail by implication from the gift over on his death without issue, was rejected on the ground that such an estate tail would be void because it was ulterior to limitations void for remoteness.[49] The argument for the gavelkind heirs was rejected, and the second argument for the plaintiff was accepted, on the ground that the gift over in clause (v) was expressed in two alternative events and the one that happened was not too remote.[50]

With regard to the gift over, Lord St. Leonards said [51]: 'If this was a regular remainder, depending upon the previous limitations, it would, of course, be open to the same objections as those limitations, and, those limitations being void, it could not take effect'. And with reference to the certificate of the Court of King's Bench in *Beard* v. *Westcott* [52] he used even more significant language [53]: 'That court held that the gift over was void, not because it was not within the line of perpetuity, but expressly on the ground I have adverted to, namely, that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take; and Lord Eldon affirmed that decision. This shows that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid'.

Lord St. Leonards thus asserts that *Beard* v. *Westcott* proceeded upon the second of the two alternative grounds which he himself had argued; but whether the Chancellor's memory can be trusted after the lapse of thirty years is open to serious question.[54] Moreover, he bases the rule upon the intention of the testator, and as we have seen this is very artificial.[55]

[49] 2 D.M. & G. 179; cf. 7 Ha. 595–6, where a different reason was given.

[50] This is the only point at which there was any substantial difference between the certificate of the Court of Exchequer on the one hand and the certificate of the Court of Common Pleas and the decrees in equity on the other. See above, notes 42 and 47.

[51] 2 D.M. & G. 180.

[52] (1822) 5 B. & Ald. 801; discussed *ante*, p. 399.

[53] 2 D.M. & G. 182. This passage undoubtedly inspired the dicta of Stirling J. in *Re Abbott* [1893] 1 Ch. 54, 57, quoted *ante*, pp. 395–396.

[54] In his argument in *Cadell* v. *Palmer* (1833) 1 Cl. & F. 372, 394–5, 408–9, he said that *Beard* v. *Westcott* proceeded upon the other ground: see *ante*, p. 399, n. 34.

[55] *Ante*, p. 396.

Observations on Monypenny *v.* Dering

Although the Lord Chancellor's remarks may be open to attack both on principle and on authority, it cannot be denied that his decision did involve the invalidity of limitations intrinsically valid in themselves. For the invalidity of limitation (iii) involved the invalidity of limitation (iv), although that limitation was not intrinsically too remote, being to the unborn sons of a living person. It also involved the invalidity of the estate tail sought to be implied in favour of A from the gift over in default of issue, though that estate was not intrinsically too remote. And it would have involved the invalidity of all the subsequent limitations, although they were not intrinsically too remote, had it not been for the alternative expression of the gift over.

But before *Monypenny* v. *Dering* is accepted as an authority for the proposition that limitations following limitations void for remoteness are themselves void, three observations may fairly be made:

(1) Although the limitation in clause (iv) to the second and other sons of A was treated as invalidated by the invalidity of clause (iii), there were in fact no sons of A at all. If there had been, they would have been represented in court by counsel, and could have argued the point.

(2) Although A's estate tail was treated as invalidated by the invalidity of the prior limitations, A's estate tail was only an implied one, and it does not follow that the decision would have been the same if it had been express.

(3) The limitations in clause (iii) were treated as being void not under the modern rule against perpetuities, but under the old rule forbidding limitations to the issue of unborn persons after limitations to the first unborn takers. Lord St. Leonards himself said so,[56] and his decision is treated as having proceeded on this ground by textbooks of authority[57] and by the Court of Appeal in *Re Nash*.[58] Moreover, the whole of the judgments of the Court of Exchequer and a major part of the judgments of Wigram V.-C. and Lord St. Leonards were devoted to a discussion of the *cy-près*

[56] 2 D.M. & G. 170: 'The rule of law forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon'. I admit that there are other passages in the judgment which are ambiguous from this point of view; but the truth is that 'Lord St. Leonards never really grasped the distinction between perpetuity and remoteness': *Jarman on Wills*, p. 328 n. (*m*).

[57] *Jarman on Wills*, p. 257; *Theobald on Wills*, p. 407. Even Gray, the implacable critic of the old rule against perpetuities, has to admit that in *Monypenny* v. *Dering* Lord St. Leonards fostered the notion that the old rule had an independent existence: s. 287.

[58] [1910] 1 Ch. 1.

doctrine, which is usually regarded as an exception to or mitigation of the old rule against perpetuities, and as having nothing to do with the modern rule.[59] If the limitations in *Monypenny* v. *Dering* were void under the old perpetuity rule, it does not follow that the ulterior limitations would be void under the modern rule. This question is discussed in connection with *Re Mortimer*.[60]

Re Mortimer [61]

In this case the testator devised land (i) to the use of A for life, (ii) remainder to the use of the first and every other son of A successively for life, (iii) remainder to the use of the first and every other son of that son successively in tail male, (iv) remainder to the use of the daughters of each of the sons of A as tenants in common in tail with cross-remainders between them, (v) remainder to the use of the daughters of A as tenants in common in tail with cross-remainders between them, (vi) remainder to the use of A in fee simple. A survived the testator and died without having had any issue. It was held by Farwell J. and the Court of Appeal that the *cy-près* doctrine could not be applied so as to give an estate tail to the first and other sons of A, because that would introduce a class of persons whom the testator deliberately omitted, namely the daughters of the sons of a son; that limitations (iii) to (v) inclusive were therefore void; and that limitation (vi) was also void. The judgments are almost entirely concerned with the first point; limitations (iii) to (v) were assumed to be void, as indeed they clearly were; and limitation (vi) was also assumed to be void without much argument or discussion. Indeed, Mr. Cyprian Williams [62] even said that on this point the case had been 'given away'. But it is impossible to imagine that two counsel as eminent as

[59] Contra, *Gray on Perpetuities*, ss. 643–70; Megarry, 55 L.Q.R. 422 (1939), but in each case for special reasons. Gray refused to admit that the old rule against perpetuities had an independent existence, notwithstanding the decisions of the Court of Appeal in *Whitby* v. *Mitchell* (1890) 44 Ch.D. 85, and *Re Nash* [1910] 1 Ch. 1, and was thus forced to regard the *cy-près* doctrine as an exception to the modern rule. Megarry thinks that the doctrine may still exist as a mitigation of the modern rule against perpetuities, notwithstanding ss. 130 (1) and 161 (1) of the Law of Property Act, 1925, and notwithstanding the repeated statements by judges before 1926 that the *cy-près* doctrine was an anomaly not to be extended. This is not the place to answer Mr. Megarry's argument in detail; but to my mind it has to overcome too many hurdles to be convincing.

[60] [1905] 2 Ch. 502.

[61] [1905] 2 Ch. 502. The headnote is inaccurate. The case was strongly criticised by Gray in 23 L.Q.R. 127 (1907); but the criticism is now withdrawn: *Perpetuities*, s. 251, n. 2. The case is now the principal authority cited by Gray for the proposition that ulterior vested limitations following limitations void for remoteness are void.

[62] 27 L.Q.R. 112 (1911).

Mr. Haldane, K.C., and Mr. R. J. Parker (as they then were) could have allowed the point to go by default.

Observations on *Re* Mortimer

Although limitations (iii) to (v) were intrinsically void both under the rule in *Whitby* v. *Mitchell* and under the modern rule against perpetuities, it seems clear that they must have been treated as void under the former rule only. For in the first place, the *cy-près* doctrine has nothing to do with the modern rule against perpetuities [63]; and secondly, the limitations were by way of legal contingent remainder. Now at the date when *Re Mortimer* was decided, there were only two cases,[64] both very recent, which said that legal contingent remainders were subject to the modern rule against perpetuities; and the first of those cases had already provoked a certain amount of discussion.[65] It is therefore incredible that the Court of Appeal should have decided such a controversial point *sub silentio*.

One crucial question remains. If a case decides that limitations following limitations which are void under the old perpetuity rule are void, is it an authority for the proposition that limitations following limitations which are void under the modern rule are void? To put the matter in another way, are the consequences of a limitation being void under the old and modern rules necessarily the same? In one respect it is undoubtedly true that the consequences of invalidity are the same under both rules. An appointment which is void for remoteness will not raise a case for election, and this is so whether the appointment is void under the old perpetuity rule, as in *Re Nash*,[66] or whether it is void under the modern rule, as in *Wollaston* v. *King* [67] and *Re Oliver's Settlement*.[68] But the reason why no case for election arises is the same under both rules: namely, that otherwise an indirect validity would be given to limitations contrary to the policy of the law. The rule, if it be a rule, that limitations following void limitations are themselves void, cannot be based on considerations of substance or policy; it is arbitrary and purely technical. It is submitted, therefore, that any court (even a court of first instance) is free to distinguish cases like *Brudenell* v. *Elwes*, *Monypenny* v. *Dering* and *Re Mortimer* on the

[63] See *ante*, p. 404, n. 59.
[64] *Re Frost* (1889) 43 Ch.D. 246; *Re Ashforth* [1905] 1 Ch. 535.
[65] See *e.g.*, Vaizey, 6 L.Q.R. 410 (1890); Firth, 14 L.Q.R. 133 (1898); Cyprian Williams, 14 L.Q.R. 234 (1898); Sweet, 15 L.Q.R. 71 (1899).
[66] [1910] 1 Ch. 1.
[67] (1869) L.R. 8 Eq. 165.
[68] [1905] 1 Ch. 191.

ground that the limitations there were void under the old perpetuity rule, and that rule has been abolished.[69]

Re Backhouse [70]

In this case the testator bequeathed a picture to A for life, and then to B for life, and then to C for life, and after her death to the first and every other son 'then living' of A successively for their lives, and then to the first and every other son 'then living' of B successively for their lives, and then to the first and every other son 'then living' of C successively for their lives, and then to his own right heirs.

In a short unreserved judgment, in which no authorities were cited, Eve J. held that the limitation to the first and other sons of B was void for remoteness, since the expression 'then living' meant living at the death of the last son of A and not living at the death of C; and that all the subsequent limitations, including the ultimate gift to the right heirs of the testator, were also void for remoteness.

The gift to the testator's heirs was obviously vested, since there was no qualification that they had to be living at the determination of the preceding limitation. The decision is therefore a clear authority for the proposition that a vested limitation is void if it follows an interest which is too remote. But it is the only authority for that proposition which cannot be distinguished on some ground or other.

Cases where the Ulterior Limitation is Valid

There is a well-known group of modern cases which, while paying lip-service to the principle that a vested limitation is void if it is dependent on a void prior limitation, nevertheless decide that the ulterior limitation is good if it follows but is not dependent on the void limitation. There can be little doubt that the scope of this 'exception' to the principle has expanded since 1936, and the difficulty now is to distinguish the 'exception' from the 'rule'.[71] The difficulty is enhanced by the fact that the judges have given different reasons for their decisions.

In *Re Abbott* [72] the testatrix gave a special power of appointment which was void because it might be exercisable by an unborn person in favour of unborn persons, and then made a gift in default of appointment to her grandchildren at twenty-one. It was held

[69] By s. 161 of the L. P. A., 1925.
[70] [1921] 2 Ch. 51.
[71] Cf. *Bailey on Wills*, p. 157.
[72] [1893] 1 Ch. 54. Followed in *Re Hay* [1932] N.I. 215.

by Stirling J. that the gift in default of appointment was valid. The learned judge based his decision on the intention of donors of powers in general. 'The intention is that they' (limitations in default of appointment) 'should take effect unless displaced by a valid exercise of the preceding power of appointment. . . . If the power be to any extent invalid, then the only result will be that these interests can never be displaced.'[73]

In *Re Canning*[74] the testator gave the residue of his personal estate to trustees upon trust to apply the income in their discretion in keeping up his mansion house (which he had entailed in strict settlement) so long as any person entitled to the possession thereof should be under twenty-one and 'subject thereto' in the events which happened upon trust for A absolutely. It was held by Farwell J. that though the gift of the income of residue was void for remoteness, the gift of capital was valid, because it was 'independent of the earlier trust although intended to be made subject to it'.[75] The learned judge thus based his decision, not on the intentions of testators in general, but on the words in which this particular testator had evinced his intention. He did not, however, explain what makes an ulterior limitation 'independent' of a prior limitation instead of dependent on it.

In *Re Coleman*[76] the testator divided his residue into five parts, giving one to each of his children, and directed that the share of one of his sons should be held on discretionary trusts for the benefit of the son during his life, and after his death upon trust during the life of any widow whom he might leave upon discretionary trusts for her benefit, and after her death upon trust for his children at twenty-one. It was held by Clauson J. that though the discretionary trust for the widow was void for remoteness, because she was not necessarily a life in being, the ultimate gift to the children was valid.[77] The learned judge did not give any fresh reason of

[73] [1893] 1 Ch. 54, 57, 58.
[74] [1936] Ch. 309.
[75] [1936] Ch. 309, 314.
[76] [1936] Ch. 528; discussed in 53 L.Q.R. 13. It was conceded that *Re Benyon-Winsor* (1917) 143 L.T.J. 178, a decision of Eve J., which seems contrary, was too imperfectly reported to be relied upon. That case may be 'paired' with *Willson* v. *Cobley* [1870] W.N. 46, where on different facts a vested ulterior limitation was held valid: but the case is so shortly reported that it is barely intelligible.
[77] The case was decided after the son's death and it should be noted that the effect of the decision was not to accelerate the gift to his children. There would have been an intestacy during the life of the widow had there not been an absolute gift to the son in the first instance which was later cut down. Under the rule in *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551, the income went to the son's estate until his widow's death. His children made no argument that they were entitled immediately.

his own for holding that the ultimate gift was valid, but based his decision on *Re Canning*.

It will be observed that there is an affinity between these three cases, in that in *Re Abbott* the ultimate limitation was subject to a void power of appointment, while in *Re Canning* and *Re Coleman* it was subject to a void discretionary trust: but the discretionary trust was tantamount to a power of appointment or disposition.[78] In *Macpherson* v. *Maund*,[79] however, this element was lacking. The case is not so well known to English lawyers as it deserves to be, having regard to the reputation of the eminent court which decided it. A testator gave one moiety of a fund upon trust for the grandchildren of A at twenty-one and the other moiety upon trust for the children of B at twenty-one, and 'subject thereto' gave the whole fund upon trust for the children of C at twenty-one. It was held by the High Court of Australia, consisting of Latham C.J., Rich, Starke and Dixon JJ., that the gift to the children of C was valid, despite the obvious invalidity of the gift to the grandchildren of A which preceded it.[80]

It is not clear how these four cases are to be reconciled with *Re Backhouse*.[81] In each case there was a vested interest (or, which for this purpose is the same thing, a contingent interest which was bound to vest if at all within the perpetuity period) preceded by an interest which was too remote. In *Re Backhouse* the vested interest was held void, but in the other four cases it was held valid. The cases cannot be reconciled by drawing distinctions between the words introducing the ultimate limitation: there cannot, surely, be any difference between 'and then' (*Re Backhouse*) and 'after his death' (*Re Coleman*) or 'subject thereto' (*Re Canning*) or 'subject as aforesaid' (*Macpherson* v. *Maund*). They cannot be reconciled on the ground that the testators in *Re Abbott*, *Re Canning*, *Re Coleman* and *Macpherson* v. *Maund* intended the persons entitled under the ultimate limitations to take in any event, if the prior limitations failed for any reason: for so did the testator in *Re Backhouse*. They cannot be reconciled by saying that the ultimate limitation is void if it is expectant and dependent on the void prior limitation, but valid if it can take effect independent of it: for that only pushes the problem one stage further back: when is an ulterior limitation dependent on a prior one? No satisfactory answer has ever been given to this question, nor (it is submitted) will it ever be.

[78] Gray, s. 251, n. 2.
[79] (1937) 58 Com.L.R. 341.
[80] The learned judges cite the English cases from *Re Abbott* onwards, and find obvious difficulty in formulating the distinction between them.
[81] [1921] 2 Ch. 51; *ante*, p. 406.

It is evident that what has happened is this. When Stirling J. in *Re Abbott*[82] attempted to rationalise the supposed rule that limitations following void limitations are void, he also provided himself and his successors with a device for escaping from that rule whenever this was felt to be necessary or desirable. Since the supposed rule cannot be based on any intelligible principle, it is hardly surprising that the means of escape should have been eagerly seized upon, and that the scope of the exception should tend to expand rapidly. But as it is impossible to draw any clear line between the rule and the exception, or to formulate the exception in terms which do not trench upon the rule, it seems most probable that the exception is destined to absorb the rule, and that one day the rule will be discarded. Since the rule is not justified in principle nor adequately supported by authority, it is submitted that the sooner this is recognised, the better.

Conclusions

(1) A distinction must be drawn between ulterior limitations which are dependent on the same remote contingency as the prior limitation, and ulterior limitations which are vested. The former are obviously too remote.

(2) On principle, a vested limitation following a limitation which is void for remoteness ought to be valid, because the rule against perpetuities does not apply to vested interests.

(3) The only reason which has ever been given for holding the ulterior limitation void is unsatisfactory, because it ascribes a most unlikely intention to testators, and because it proves too much.

(4) Apart from dicta, the only authority for holding the prior limitation void is the case of *Re Backhouse*,[83] a single unreserved judgment of a court of first instance; for

(a) *Robinson* v. *Hardcastle*,[84] *Routledge* v. *Dorril*[85] and *Brudenell* v. *Elwes*[86] were cases of appointments under powers, and in two of them the prior gift was void not only for remoteness but also because the appointees were not objects of the power.[87]

(b) *Beard* v. *Westcott*[88] can be discounted because the Courts of Common Pleas and King's Bench disagreed; the decision

[82] [1893] 1 Ch. 54, 57.
[83] [1921] 2 Ch. 51.
[84] (1788) 2 T.R. 241; 380; 781; 2 Bro.C.C. 22, 344.
[85] (1794) 2 Ves. 357.
[86] (1801) 1 East 442.
[87] See *ante*, p. 398.
[88] (1813) 5 Taunt. 393; (1822) 5 B. & Ald. 801; (1822) T. & R. 25; *ante*, pp. 398–400.

in favour of the latter's certificate could not have been given with greater hesitation; no reasons are given; and the case may have been overruled by *Cadell* v. *Palmer*.[89]

(c) *Monypenny* v. *Dering*[90] can be distinguished on the grounds (i) that one of the ulterior limitations existed only on paper; (ii) that the other ulterior limitation was only implied; and (iii) that the case was decided under the old rule against perpetuities. *Re Mortimer*[91] can also be distinguished on this last ground.

(5) Since 1936 the cases justify the formulation of an exception to the supposed rule that the ulterior limitation is void, but the exception can only be formulated in terms which trench upon the supposed rule, and no clear dividing line between them can be drawn.

(6) It would therefore be more sensible to discard the supposed rule altogether and treat the 'exception' as the rule. On the authorities, there is no reason why any court, even a court of first instance, should not boldly assert that vested limitations following limitations void for remoteness are valid.

[89] (1833) 1 Cl. & F. 372.
[90] (1847) 16 M. & W. 418; (1850) 7 Ha. 568; (1852) 2 De G.M. & G. 145; *ante*, pp. 403–404.
[91] [1905] 2 Ch. 502.

CIVIL PROCEDURE IN FRANCE AND ENGLAND

An Introductory Lecture [1]

C. J. Hamson

. . . It is my purpose today to attempt to deal with one or two elementary matters which may, I think, cause preliminary difficulty to a person endeavouring to study and compare civil procedure in France and in England.

The first concerns the meaning of civil business itself. An English lawyer, asked what he means by civil business, would probably first and automatically, like his French colleague, distinguish civil and criminal causes. There would be agreement, I think, in regarding civil business as that part of the court's work which is non-criminal. But, asked for an example of civil business, the English lawyer would almost certainly select a case from the King's Bench Division of the High Court. Now the business done by the King's Bench Division, even when the criminal work has been excluded, is extremely varied and extensive. For example, it includes much of the work done in France both by a tribunal de commerce and by the Conseil d'Etat itself. The King's Bench Division has a universal jurisdiction—not only territorially, ratione loci, but also ratione materiæ over a great variety of questions. In France, on the contrary, the principle has been adopted of dividing and separating jurisdictions. Though the tribunal de première instance has what is called a 'jurisdiction de droit commun', the tribunal de commerce has as its own an important jurisdiction which is clearly and decisively separated therefrom. I think it evident that no French jurist would be tempted to class a commercial case as civil business. Still less would he be tempted to regard as civil any business falling within the competence of the Conseil d'Etat: the distinction between civil and administrative business would be to him self-evident, even though a difficult instance might give rise to conflict. These distinctions, so far from being self-evident to the English lawyer, would not be accepted by him at all. In civil business the English lawyer includes in general the residuary non-criminal work of the courts: the French lawyer by the same term indicates a limited portion only of that work—namely, that which falls within the competence of a tribunal de première instance jugeant au civile.

[1] This is a translation of part of a lecture delivered in the Salle des Actes of the Faculty of Law in Paris on December 16, 1949.

I do not wish to spend time upon the historical causes of this difference between the two countries. At one time we also knew of separate commercial courts, but certainly by the end of the eighteenth century the common law courts had absorbed them: though of course a good deal of commercial business is done in England by way of arbitration, which is permissive. It has, however, never yet occurred to the English to set up separate general administrative courts—mainly, I think, because the protection of the liberty of the individual has long and traditionally been associated with the power of the common law judges. It should be remembered that in the seventeenth century they sided with Parliament (which rightly or wrongly claimed to champion that liberty) against the King; and they have tended, in popular estimation, to grow in authority and prestige. Whereas in France, on the contrary, at the French Revolution there was a determined attempt to break the power of the French judges whose conservatism was suspected and whose parlements of former days were feared. It is noteworthy that the two most important courts today in France—the Cour de Cassation and the Conseil d'Etat—were not by the Revolutionary fathers conceived of as courts at all. A very humble role was by them attributed to the civil judge. They believed, or affected to believe, that if the laws were properly codified the business of the civil judge in administering justice was, if not trivial, at least comparatively easy and unimportant. The notion of what business is in France appropriate to the civil judge has I think been, and I believe still remains, much coloured by the view adopted at the French Revolution.

May I emphasise that this notion of appropriate jurisdiction is much more important than has commonly been allowed? For example, there has been much comment on the Continent upon the position of the English judge—in which incidentally the role of the 'juge unique' has tended to be exaggerated. It has been suggested that his position is due to the method of his recruitment, to his pay, to his independence, to the restriction of number of judges and to many other causes. These causes are no doubt important: they contribute in no small degree to secure his position. But primarily, I venture to believe, his position is due to his office—that is, to the jurisdiction which is entrusted to him. If in France you were, out of the body of some 4,000 judges, to select some fifty or so to whom was entrusted the whole of the more important business throughout France which is at present conducted by the tribunaux de première instance, the tribunaux de commerce, the Cours d'Appel and the Conseil d'Etat, it is to my mind evident

that these men, however selected and however paid, would assume in the community an outstanding position. It is, I think, wrong and misleading to regard the English judge as a special act of providence. There are judges in other countries as learned, as independent and as competent as the English judges, though I wish in no way to question the excellence of our judges. But in no country other than England has it happened that to so small a body of men has been entrusted so enormous a jurisdiction. Though it is true that the judges, the men, created the office, it is, I think, also true that today the office creates the man, the judge.

However that may be, the extent and variety of the jurisdiction of the King's Bench Division has important consequences so far as procedure is concerned. A court must necessarily have a procedure which is adequate to deal with the matters coming before it. If some of those matters are highly complicated and difficult, it is at least likely that the procedure will be elaborate and powerful. The procedure in the King's Bench Division must be adequate effectively to bring before the court a Minister of State and his whole department. It is worth while noting that such a Minister today in himself concentrates a power greater than the totality of powers vested in the Stuart kings, which our ancestors considered to amount to tyranny and which in their opinion warranted the raising of a civil war. To break down the recalcitrances of such a defendant, it is desirable and necessary to have a sledge-hammer. The King's Bench Division does, in its procedure, dispose of such a sledge-hammer; and there are few persons in England who would wish to deprive that Division of its weapons. But because the jurisdiction is one and indivisible, the same sledge-hammer is likely to be used to crack more trivial nuts—to settle the comparatively very minor quarrels of individuals; and that is not so reasonable. It is probable that the French jurist will sometimes feel that the English civil procedure is over-elaborate, especially in those cases which he regards as properly speaking civil matters. The French system of subdividing jurisdiction and giving to each subdivision a procedure appropriate to its limited matter is, in the abstract at least, more logical than the English. In a civil matter of medium importance English procedure tends to be heavy and extremely expensive. But whether in practice it is worth while paying that price in order to have in reserve if necessary the extreme efficacity of the King's Bench procedure—that is a question of high policy upon which I would wish to express no opinion. A comparative lawyer is better occupied in drawing attention to existing facts rather than in essaying such judgments of value.

A French jurist may well be inclined to suspect that the expense of an English trial amounts to a denial of justice in those civil cases at least which must of necessity come before the King's Bench Division. There may be grounds for such a suspicion. But here also we find ourselves confronted with fundamental and largely inarticulate social beliefs or prejudices. It may be that in France justice is regarded as a ' service public ' much like another and that the State is believed to be under a duty to put at the convenient disposition of the public the necessary means of justice. In England the classical opinion was perhaps that it is a high and peculiar privilege of the subject to compel a royal judge to inquire personally into a matter primarily interesting only the subject, and that it was not unreasonable that the exercise of such a privilege should turn out to be somewhat expensive. There are advantages in such an opinion. The individual in a country where that belief is prevalent is likely to be much more cautious in embarking upon litigation, whether as plaintiff or as defendant; and this hesitation is, I think, salutary. Certainly it is to be observed that an Englishman is in this respect much more hesitant than the Frenchman; and the advantage in this particular case is not entirely with the French system.

The extent of the King's Bench Division's jurisdiction has therefore, of itself, important consequences upon procedure. Even more important, however, was the power of attraction exerted over other courts by that Division and especially by its ancestor, the Court of King's Bench. That court was eminently successful, and nothing succeeds like success. Not only have the very names of the other common law courts disappeared, but, what is for us more significant, during the course of the nineteenth century, the common law procedure exercised an ever-increasing influence over the procedure of the Chancery courts—the courts which dispensed equity. Notable differences still subsist between the practice of the King's Bench Division and that of the Chancery Division, and they very properly attract the attention of the practitioner. The comparative lawyer should, however, be more impressed and even surprised by the increasing resemblances between the two procedures.

I venture to draw the attention of French jurists to the Chancery court and to its procedure. If there is, or was, in England any court particularly concerned with civil matters in the French sense of the word, it is our Chancery court. It deals primarily with the administration of estates (successions), contracts for the sale of land, mortgages and trusts generally which include the French contrats de mariage, dotations and general family arrangements. Though in theory a subsidiary jurisdiction it has long ago become

autonomous. But because it had an origin distinct from that of the common law courts and because it came much more directly under the influence of canon law, its procedure at the beginning of the nineteenth century much more resembled French civil procedure. It relied, and still relies, more upon written evidence, in the form of affidavits, than do or did the common law courts. It knew a system of reports which resembled the French enquête. It was not bound by those common law rules of evidence which so surprise the French lawyer; and it made use of interrogatories which are known to the French system but were strange to the common law courts. The traffic during the nineteenth century was not all one-sided; the common law courts took over some of the devices of Chancery—notably discovery and injunction—but in general, Chancery was more influenced by the practices of the common law courts than conversely: so much so that not only are witness actions now quite frequent in a Chancery court (which before were unknown) but no real difference can today be seen between a witness action in that court and a normal action in the King's Bench Division: except that a King's Bench Division practitioner affects to believe that the Chancery practitioner is somewhat amateurish in the handling of such an action.

What perhaps is worth emphasising is that the English lawyer has, in the history of his own law, been in contact with a procedure which in some degree resembled French procedure and that during the nineteenth century he came to prefer generally the procedure of the common law courts, though that procedure has in many most important points been modified. In particular, the common law method of taking evidence and hearing witnesses has triumphed. I venture to believe that the Commission in France at present considering the reform of the Code de Procedure civile may find it profitable to consider the history of Chancery procedure in England in the nineteenth century.

The third general observation touching the King's Bench Division procedure which I have to make—and it is a startling one—is this. The Court of King's Bench was not only concerned with many non-criminal matters which extended far beyond the sphere attributed by the French system to a civil tribunal but was concerned, perhaps principally, with criminal business as such. Indeed, in the earlier period of our legal history it was not always easy to distinguish civil and criminal business, and the normal civil action, that of trespass, continued until the close of the seventeenth century to have a criminal aspect.

Whatever may be the historical reasons, what is very remarkable, and what has not been sufficiently observed, is that our

criminal and civil procedures continue very strongly to resemble each other. In France, as in most other civilised European countries, there is a great gulf fixed between civil and criminal procedures; in England it is, at the least, very much less: particularly so far as the trial is concerned. Indeed we have one word to describe the last stages of both civil and criminal causes: the trial; whereas a Frenchman would, I believe, tend instinctively to keep very separate the civil 'audience' from 'l'instruction definitive' in a criminal cause. There are, of course, important differences in the two procedures even in England, particularly as regards preliminary matters; but the resemblances between a civil and a criminal trial in an English court are extraordinarily striking, and are not accidental.

Lawyers generally, and particularly common law lawyers, are economical of ideas. Having found and perfected a method of ascertaining a fact or determining an issue, they used that method indifferently in civil and criminal causes. I venture to believe that many of the advantages which Continental jurists are willing to see in English criminal procedure are due to the fact that it is a procedure which has been humanised by its relation to civil business. Indeed, an English prosecution can be described as a civil proceeding in which the Crown happens to be the plaintiff and in which, because of the formidable quality of that plaintiff, it has been thought proper to give to the defendant advantages which an ordinary civilian defendant does not enjoy. But conversely the French jurist when considering English civil procedure should remember that he is observing a process which can bring to bear, upon the determination of a fact, that array of resources which may be more appropriate to a criminal prosecution. Hence arises probably his sense of the over-elaboration of the English civil process.

There are two factors which particularly illustrate the resemblance between civil and criminal trials in England. Of them the first is the presence of the jury in a civil case. It is true that the civil jury is being less and less actually employed: even in King's Bench Division actions it is now used in less than five per cent. of the cases. But the French observer will not allow himself to be misled by mere statistics. The civil jury has had, and continues to have, immense influence upon English civil procedure. Even when physically absent, it is morally present. Even when the judge, as commonly happens, is charged with the ascertainment of fact which was within the province of the jury, he proceeds to ascertain that fact as if he were the jury. The evidence is displayed before him as before a jury; he himself separates his own functions; and he directs himself as he would a jury. The

jury still rules English civil procedure in court in much the same way as it did when it was the almost invariable concomitant of a civil action in the Court of King's Bench.

It is from the civil jury that should be derived that most striking feature of an English civil trial, one which gives it, to a Continental observer, the appearance of a criminal cause, namely, the oral method of proof—l'oralité de la preuve. It is this orality of the proof which makes the greatest contrast between the French and the English civil action. It is the conception of how proof should be made which gives to each hearing its particular characteristics. The French ' audience ' is a subsidiary and almost a superfluous incident, the English hearing is the critical moment. It is at the hearing, and by reason of what is heard then, that the English judge or jury must form that ' intime conviction ' which will decide the issue of fact, and usually of law also. The French judge will form his opinion subsequently by a study of the dossier—of which there is in an English civil action no equivalent. Indeed, it is impossible for a French civil judge to deliver judgment at the hearing itself in a civil case (except en référé), whatever may have been the intention of the legislator—see, *e.g.*, art. 116 of the Code de Procédure Civile; for the French judge has not before him then the material necessary. It is, on the contrary, the normal practice of an English judge in a civil action to deliver judgment then and there upon the close of the oral evidence and argument. If upon such solemn matters I may coin an irreverent aphorism : the English axiom is that, if a civil judge is literate, he nevertheless cannot be expected to read, whereas the French hypothesis seems to be that, if capable of hearing at all, he certainly cannot be trusted fully to understand human speech.

There are many curious diversities between French and English methods of proof, and even many apparent contradictions. In civil matters, the French system often retains formal proof—la preuve pré-établie—and often excludes oral testimony or some oral testimony : for example, that of the parties; but on the other hand once oral testimony is admitted there are no artificial barriers to its reception—the French system has no equivalent of the English rules of evidence. The English system on the other hand today, in general, admits or requires oral evidence, including the evidence of the parties, subject always to cross-examination; but nevertheless has extremely strict rules of evidence which govern what the admitted witness may say and how he shall say it. But clearly it is not possible here to examine these differences, which I believe are the really fundamental differences between the systems. It may, however, be worth while to note this—that the orality and

strictness of proof are higher in an ordinary English civil trial than they are even in a French criminal cause tried at the Cour d'Assises. Even at the Cour d'Assises there is in front of the President a dossier which he manifestly consults and the contents of which are neither available to the public nor proved before the court in the English sense of the word.

There are two results of the orality of proof which I will mention. It gives to an ordinary English civil action an extreme dramatic quality and one which has caught the public imagination. The English public, personally or through its newspaper representatives, follow the detail of an important civil action in a way which is not possible in France. Moreover, what the court does is done in an extraordinarily manifest and public manner. Because *all* the evidence upon which the court itself acts is necessarily given orally and publicly at the hearing, a member of the public present at the hearing is as well informed as the court of the materials upon which the court reaches its conclusions. I believe that it is this public display of *all* the evidence, this constantly available if silent confrontation of the evidence and the court's conclusions thereupon, which contributes powerfully to the public confidence in our judges and to their reputation generally not only for impartiality but for fair and reasonable judgment.

May I end by saying that an English lawyer may well feel the need of a certain apology when speaking of English civil procedure in the High Court? It is elaborate, it is expensive, it is even, in some respects, unreasonable. It surely is extraordinary that in a civil matter we should use methods of proof which are probably more appropriate to an important criminal cause. The French system is in many respects less ponderous than the English; though I have no doubt that under the French as under the English substantive justice is done. Yet I would suppose that each people is profoundly and rightly attached to its own system. No reasonable comparative lawyer aims at the transference of an institution from one country to another; such transference is probably impossible and not likely to be successful. The experiment of a criminal jury in France has not been promising. What a comparative lawyer may reasonably expect is that the study of a foreign system will enable him the better to understand his own and to discover in his own possibilities of development according to its own native genius which might not otherwise have been apparent. In this sense I believe that the comparative study of procedure may be particularly helpful to French and English lawyers alike. I shall be well satisfied if what I have had to say may help some of them to avoid some of the preliminary difficulties of such a comparison.

SUGGESTIONS REGARDING THE LIABILITY OF CORPORATIONS FOR THE TORTS OF THEIR SERVANTS.

D. I. C. Ashton-Cross

'. . . It is certain', says Winfield, in writing of the liability for torts committed by servants of corporations,[1] 'that, whatever the law may be where the corporation has *expressly* authorised the commission of an *ultra vires* tort, no authority to the servant or agent to commit such a tort can be *implied*': and he illustrates his point by the well-known case of *Poulton* v. *L. & S. W. Ry.*[2] Poulton, in terms of an arrangement which he had made with the railway company, was entitled to free carriage of a horse. At the end of the journey the local stationmaster demanded payment for the carriage of the horse; Poulton refused to pay, and the stationmaster detained him. The Court of Appeal held that the railway company was empowered to detain goods, but not persons, for non-payment of carriage; that accordingly they had no power to detain Poulton, even on the assumption that he had wrongfully taken the horse by train without paying; that there could be no authority for the arrest implied to the stationmaster; and that his employers were not liable for his tortious act.

Salmond[3] explains that '. . . the true ground of the decision, common to all members of the court, was merely that the *implied* authority of a stationmaster does not extend to the doing of acts which are *ultra vires* of the company, and that in the absence of any proof of *express* authority the stationmaster was acting beyond the scope of his employment and the company was therefore not responsible'.

Since *Poulton* a number of cases arising out of more or less similar facts have come before the courts. The latest is believed to be *Percy* v. *Glasgow Corporation*,[4] a Scottish case which went to the House of Lords. Percy, a passenger in a Glasgow tramway car, tendered for his fare a coin the genuineness of which was doubted by the conductor. A dispute arose between Percy, the conductor and an inspector who had boarded the car, and Percy was handed over to the police by the conductor and inspector. The tramway

[1] *Law of Torts*, 4th ed., p. 106.
[2] (1867) L.R. 2 Q.B. 534.
[3] *The Law of Torts*, 10th ed., p. 55.
[4] 1922 S.C. (H.L.) 144.

bye-laws authorised the seizing and detaining of a passenger attempting to evade payment of his fare ' whose name or residence is unknown to ' the servants of the Corporation. Percy averred that these were known to both the conductor and the inspector because he gave them at the time, and he sued the Corporation for damages for wrongous apprehension.

Unfortunately Percy's averments were stated ambiguously, and the Court of Session dismissed his action as irrelevant on the ground that in terms he had averred that the Corporation's servants were to their knowledge acting beyond the scope of their authority, which being so of course no action would lie against the Corporation. He appealed to the House of Lords who had to decide only this technical point of relevancy. The Lords concluded that Percy's averments should not in all the circumstances be construed against him, and allowed him an action.

Fortunately for our purpose there is in the Opinions some discussion of the general liability of an employer for his servant's torts, and Lord Dunedin considers the particular liability for a tort committed by the servant of a corporation, saying [5]—' I do not conceive that there can be any doubt as to the general law which, while I was at the Bar, was always held as settled by the cases of *Goff* v. *Great Northern Ry.*[6] and *Moore* v. *Metropolitan Ry.*[7] which I always understood were good authorities in Scots law; and, if any doubt remained as to that subject, it was certainly set at rest by the decision of the First Division in *Lundie* v. *MacBrayne* [8] where Lord Kinnear based his judgment on what had been laid down in *Moore's* case. The matter, I think, is very shortly put in a single sentence by Lord Kinnear in that case. He says, speaking of what is necessary to make a company liable : " First, the offence must be one for which, if it had been committed the company had power to arrest, because it is not to be presumed that the company have authorised one of their servants to apprehend a person whom they themselves had no power to apprehend; and, secondly, that the officer was acting within the scope of his authority " '.

So then is the law stated—a corporation with limited powers cannot be made liable for the torts of its servants not expressly authorised unless two factors are present : (a) the servant must at the time of the tort have been acting within the scope of his employment and authority; and (b) the corporation must itself

[5] At p. 154.
[6] (1861) 3 E. & E. 672.
[7] (1872) L.R. 8 Q.B. 36.
[8] (1894) 21 R. 1085.

have had power to do the act. It may well be that such was not intended to be the law, or ought not to be the law,[9] but that is a different matter.

The writer finds difficulty on two points. The first is in regard to Winfield's and Salmond's statement of the law, which seems to mean that a corporation can *never* be liable for any tort committed by its servant (not expressly authorised to commit that tort) because every tort is *ultra vires* any corporation. No doubt it is true that no corporation can take power to commit a tort; but is it equally true that a servant of a corporation can *never* have such *implied* authority as may impose liability on his employer? Must a power of arrest, for instance, in the case of a corporation *always* be expressly conferred by its charter if that corporation is to be liable to the victim of a wrongful arrest made by its servant? Has not a corporation without express power nevertheless the ordinary powers of arrest which in some circumstances lie with an individual, as where he catches a thief in the act?

I know of no English case to illustrate the point I seek to make, but there is a Scottish case, *Neville* v. *C. & A. Modes, Ltd.*[10] The pursuer was detained and wrongly accused of theft by servants of the defenders. He brought an action of defamation only, but in general discussion of the authority of the servant to defame and arrest it was said,[11] 'Unless an authority so to act [to make charges of theft and even to arrest on occasion] is conferred upon the staff, the proprietor of the stock will for all practical purposes be disabled from safeguarding his property. I am therefore of opinion that employment in such capacities implies *per se* an authority so to act on behalf of the employer: and that . . . such an employee not only had authority but even had a direct duty so to act in appropriate circumstances. . . . No more than the proprietor himself is the shop assistant or manager entitled or empowered to take action merely on suspicion. . . . In this case . . . I am of opinion that the taking of action by the employees was as appropriate as if they had actually been witnesses of an act of theft'. This seems to the writer to make good sense and sound law.

The second difficulty of the writer is to understand how it is that in some at least of the many cases regarding employers' liability for their servants' torts the plea of *ultra vires* has not been made for the employers. To take one example only, *Warren* v. *Henlys, Ltd.*[12] Warren brought an action of damages for an

[9] See 'Corporate Liability in Tort and the Doctrine of Ultra Vires', *Essays in Jurisprudence and the Common Law*, by A. L. Goodhart (1931), p. 91.
[10] 1945 S.C. 175.
[11] By Lord Moncrieff at p. 180.
[12] [1948] 2 All E.R. 935.

assault committed by a garage attendant the servant of the defendants. The attendant had thought that Warren was trying to evade payment and handing in of coupons for petrol supplied to him, and struck him following on an altercation which arose after he had in fact paid and given up the necessary coupons. The defendants were a limited company, and so any tort must be *ultra vires* of them. There was, of course, no suggestion that the employers had expressly authorised the assault. It was held that the claim of damages against Henlys must fail because the assault had no connection with the discharge of any duty to the employers. Nevertheless the court (Hilbery J.) and the parties apparently took it for granted that Henlys, Ltd. must necessarily be liable provided only that the attendant was acting in the course of his employment. Professor Goodhart (who disagrees with the decision) seemingly accepts this view.[13]

Is it that in this case as in some others the rule—that the implied authority of a servant of a company does not extend to acts which are *ultra vires* of the company—was overlooked?

[13] (1949) 65 L.Q.R. 26.

THE CONCEPT OF LAW

B. E. King

Twenty years ago Mr. Cairns set himself the task of looking at law from three points of view, that of the social sciences, that of logic and the empirical sciences, and that of philosophy. *Law and the Social Sciences* was published in 1935, the *Theory of Legal Science* in 1941. The volume under review [1] completes the trilogy. The object of all these volumes is the same—'To construct the foundation of a theory of law which is the necessary antecedent of a possible jurisprudence'. All those who have come under the spell of Mr. Cairns' stimulating thought will look forward with the greatest interest to the application and expansion of his conclusions which is now promised us in a projected final work, *The Elements of Legal Theory*.

'In its basic character', says Mr. Cairns, 'Jurisprudence is philosophical' (ix). This theme is developed in the first and last chapters, 'Philosophy as Jurisprudence' and 'Jurisprudence as Philosophy'. In between are sandwiched chapters on Plato, Aristotle, Cicero, Aquinas, Francis Bacon, Hobbes, Spinoza, Leibnitz, Locke, Hume, Kant, Fichte and Hegel. The legal theories of these philosophers are sketched against the background of their general thought and method and are illustrated by constant and illuminating references to the contemporary forms taken by the recurring social problems they were attempting to solve. But the main interest in this sandwich is not in its filling. Mr. Cairns studies the philosophers for what they can teach him. Your reviewer must be forgiven for being chiefly interested in what he can learn from Mr. Cairns.

What is the author's view of philosophy and its role in jurisprudence? 'Philosophy . . . aims at the construction of a system of general ideas that will explain all the events of human experience. Jurisprudence has a similar aim, but more circumscribed. It seeks to frame a system of ideas that will account for the events of the legal process' (p. 5). Since both studies seek the explanation of 'events', it seems natural to suppose a cross-fertilisation of thought between those seeking explanations of law, a part of human

[1] *Legal Philosophy from Plato to Hegel.* By Huntington Cairns. xv and 583 pp. The Johns Hopkins Press, Baltimore and London: Geoffrey Cumberlege, Oxford University Press. $7.50.

experience, and those seeking to understand the whole. This was once the case, and Mr. Cairns shows by practical examples how still today the courts are influenced by the legal theories of the important philosophers of the past. But 'Jurisprudence, which was at one time the daughter of philosophy, is now not even a stepchild' (p. 567). The task of the legal philosopher is to re-establish the contact of jurisprudence with philosophy so as to ensure that developments in philosophy which may be relevant to law do not simply go unheeded.

A characteristic of modern philosophy is its highly self-critical state and its concentration on the systematic study of meaning, the analysis of logic and the investigation of syntactical sentences. The results suggest the warning to the jurist that many of the problems with which he is concerned may be 'pseudo-problems' and that 'he may be bemusing himself in large part with vain techniques . . .' (p. 553). This is a point developed by Dr. Glanville Williams in his articles on 'Language and the Law' (L.Q.R., Vols. 61 and 62). Again, reflecting on its past history and the lessons of science, philosophy has come to realise 'the successes which can follow upon a reconstitution of the concepts which control enquiry'. Such a reconstitution of concepts, like Bacon's devising of a new method of inquiry, offers the best hope of advancing knowledge. And philosophy insists 'that practice cannot be reformed in any significant sense if fundamental ideas are not clarified and harmonised into a systematic theory of that minute aspect of the world that any science studies' (p. 567). Is there any lesson here for jurisprudence?

Mr. Cairns puts forth as a hypothesis, to be tested by its practical results, that 'the function of legal philosophy is the formulation and valuation of jural hypotheses' (p. 555). This is a difficult saying, the meaning of which he makes clearer by analysis. Three inquiries are involved. What are the philosophic presuppositions of the jural order, *e.g.*, the presuppositions on the basis of which the decisions of the courts are constructed? What is the nature of the objects of the jural order, *e.g.*, law, a right, property? Of what value are the presuppositions and objects of the jural order, *e.g.*, have they a truth value or a utility value, and can they be improved upon? The last inquiry is the most difficult as it is the most important. But Mr. Cairns does not despair of the ethical aspect of jurisprudence yielding some day to rational manipulation.

It has been said that it is impossible to be aware of all one's own presuppositions, and if this is true of Mr. Cairns, a reviewer's attempt to clarify them may not be out of place. What does Mr. Cairns mean by 'the jural order', or 'the events of the legal

process'? And what is the relation between his concepts of these 'entities' and his concept of 'law'? Is his concept of law 'a priori', and do orders become for him 'jural', and events 'legal', when they prove capable of subsumption under this category—or does he assume that certain orders and events are jural, and frame his concept of law so as to systematise and explain them? It would seem that the latter is Mr. Cairns' procedure. But in this case what orders and events does Mr. Cairns assume to be 'jural', and upon what grounds? No doubt we shall be told the author's final conclusions in the promised *Elements of Legal Theory*. It is hoped that the reviewer will be forgiven if he attempts to follow up clues given in the present volume and to anticipate some of their possible consequences when applied to the age-old question 'What is law?'

'We have been told by Plato that law is a form of social control, an instrument of the good life, the way to the discovery of reality, the true reality of the social structure; by Aristotle that it is a rule of conduct, a contract, an ideal of reason, a rule of decision, a form of order; by Cicero that it is the agreement of reason and nature, the distinction between the just and the unjust, a command or prohibition; by Aquinas that it is an ordinance of reason for the common good, made by him who has care of the community, and promulgated; by Bacon that certainty is the prime necessity of law; by Hobbes that law is the command of the sovereign; by Spinoza that it is a plan of life; by Leibnitz that its character is determined by the structure of society; by Locke that it is a norm established by the commonwealth; by Hume that it is a body of precepts; by Kant that it is a harmonising of wills by means of universal rules in the interests of freedom; by Fichte that it is a relation between human beings; by Hegel that it is an unfolding or realising of the idea of right' (p. 556). Thus the legal philosophers of the past have answered the question 'What is law?' 'It is far from clear,' says Mr. Cairns, 'what is involved when we ask such questions' (p. 565). But the answers given suggest at least one clear conclusion. Whereas each philosopher is addressing himself to the problem 'What do *I* mean when I use the term law', can it be said that each is contemplating the *same* empirical subject-matter and asking himself 'What is the nature of *this* entity?' The question 'What is law?' appears to be like the questions 'What is poetry?' and 'What is art?'. Answers are attempted without any agreement on the empirical objects which exemplify the concept. It is hardly surprising, therefore, that art and poetry are considered to be matters of opinion. What is surprising is that the nature of law should so often be considered to be a matter of fact capable of ascertainment without the aid of a preliminary definition.

It would seem that all discussions about the nature of law must be at cross purposes unless the disputants are either referring to the same empirical subject-matter, or alternatively, are at least aware that they are not so doing. That the term law refers, for different writers, to a different empirical subject-matter is beyond doubt. 'What warrant have we for assuming that the term "law" is univocal . . . ?' asks Mr. Cairns (p. 9). In fact we have the best possible grounds for rejecting the assumption. For Austin and most Anglo-American writers the subject-matter referred to by the term law may be just or unjust—but that part which on the above view is unjust is completely outside the reference of the term law as used by a long line of philosophers (p. 26). For Aquinas an unjust 'law' is not law at all. For Hegel it might 'exist', but would have no 'genuine reality' (p. 535). Nor is disagreement confined to the philosophers. In *Swift* v. *Tyson* (1842) 16 Pet. 1, Mr. Justice Story thought that it would 'hardly be contended that the decisions of courts constitute laws' (p. 558). Yet for the modern realists law is constituted by precisely such decisions. Mr. Cairns thinks that they have 'overwhelming empirical evidence' on their side (p. 559). But what is this evidence? Courts certainly exist and give decisions. By and large these decisions effectively dispose of certain classes of dispute. Moreover they are sufficiently predictable to enable a professional class to make a living by attempting to predict them. And they are commonly *called* law. But what is the empirical evidence that these decisions *are* 'law'? Is not their legal quality a presupposition of Mr. Cairns, rather than either a 'fact' or a hypothesis capable of verification by empirical evidence?

But perhaps Mr. Cairns' presuppositions are themselves a kind of hypotheses—the kind he would have legal philosophy formulate. Let us try stating them in this way. They would seem to be somewhat as follows. Forms of social control exist and can be known. They can be manipulated to direct human conduct to desirable ends. Practice cannot be reformed, however, if fundamental ideas are not clarified and harmonised into a systematic theory. Certain aspects of social control, perhaps the most general and the most important, are commonly grouped under the concept of 'law'. But this term is equivocal and needs to be given precision. The concept of law needs to be 'reconstituted'. The best way of doing this is to equate it exclusively with a clearly defined and empirically knowable subject-matter—'an existential subject-matter' (p. 519). The decisions of the courts are such subject-matter, and form the best basis for the reconstitution of the concept of law. The reviewer finds himself in full agreement with all these hypotheses. Some of them are readily verifiable; most of them have been generally

adopted since the decline of the Austinian School. For the rest the onus is on the legal philosopher who may be dissatisfied with existing concepts of law to frame a new concept and submit it to the test of utility. But his work will be misunderstood if the nature of his attempt is not appreciated. His new concept will not be an attempt to determine the 'essence' of a given existential material 'law'. It will be an attempt to determine the material best called law for the purpose of understanding and possibly improving the work of the courts. When the material has been thus delimited (or the province of jurisprudence redetermined) it will be time to consider the 'nature' or 'essence' of the material now designated 'law'. At this point 'legal philosophy passes into the realm of ontology. There are no risks in that enterprise provided the empirical nature of its subject-matter is kept always steadily in view' (p. 566). It may be added that it is equally necessary to keep in view the exact boundaries or limits of the subject-matter. It is too often forgotten that the first function of a concept or definition is to define.

So far the reviewer believes that Mr. Cairns is with him—and he is with Mr. Cairns. Perhaps a little further. '. . . it is plain that the tasks of law can no more be caught within the net of a single formula than its numerous and contradictory aspects can be confined within the limits of one definition' (p. 97). 'What warrant have we for assuming that . . . law . . . has an essence?' (p. 9). '. . . the way to a full understanding of the legal order may lie in some other domain' (p. 562). These are only ways of saying that the first function of a concept of law—and the first task of the legal philosopher—is to define and identify an empirical subject-matter. Ontological enquiry and explanation cannot well begin without some clear notion of an empirical subject-matter to be explained. The attempt to identify and explain a subject-matter in one sentence defining law has led to hopeless confusion. At least one can try the method of defining first and seeking to explain afterwards. Once placed on a firm empirical basis jurisprudence can perhaps afford a variety of ontological speculations—and afford to wait for them.

But at this point the reviewer may find himself inclined to part company with the author. For the author the concept of a thing seems to be 'the term applied to the way of conceiving the significant elements which have been abstracted' (p. 12). This may well be true of the concept of a thing which 'exists in the same sense that the subject-matter of the various natural sciences may be said to exist' (p. 501) and it is in this sense that Mr. Cairns presupposes the subject-matter of jurisprudence to exist. He would have law

exist in the same sense as do atoms of hydrogen and oxygen. But this is not a necessary presupposition. It neglects the insight of Fichte, who saw law as a relation. Relations between 'empirical objects' can hardly be said to exist in exactly the same sense as do the objects themselves, even though the latter, on deeper analysis, may be shown to consist largely of further relations. But at least the behaviour of empirical objects may be said to exemplify the concept of a relation—as the mutual reactions of hydrogen, oxygen, and an electric spark exemplify the concept of a law governing their combination. In this way relations—like physical laws—may be empirically verified and the concept of them may be based upon empirical subject-matter. Thus they can be known and manipulated for human purposes, both conceptually and practically, though the 'nature' of their existence be as intractable as the riddle of the universe. Similarly it may be possible and useful to conceive the term 'law' as referring to rules stating relations exemplified by the behaviour of empirical objects rather than as referring to significant elements abstracted from them. The existence of law so conceived would then be as a 'mental construct'—though this would not solve the real problem of accounting for the behaviour exemplifying it.

Whither is this leading us? If the empirical subject-matter we wish to understand and systematise under the concept of law is a form of social control constituted by the decisions of courts, it may be that the best way of conceiving law would be to conceive it as the rules expressing the relation of human freedom to the control exercised through courts. The implications of this hypothesis for the interpretation of social reality may be tested. By the legal liberty to perform or abstain from an act we would mean that in neither case would the courts attempt to control the agent. If in either case the courts would attempt control we would say that the agent was under a duty to refrain from, or alternatively to perform, the act. Thus with respect to any act X every agent Y would, by necessary logical implication, be possessed of either a legal liberty to perform or a legal duty to refrain from it. This would be expressed in the form of the possible alternative rules 'if Y does X, the courts will do nothing' or 'if Y does X the courts will attempt to control Y by force'. These we would say were rules of law, stating the relations of liberty or duty. For law thus conceived to exist or be exemplified in any society it would logically suffice to have one court which would attempt to control one person X, in respect of one act Y. There would be one rule of law in the form 'if X does Y the courts will attempt to control him by force'. In respect of all other acts X would have legal

liberty, and so would all other persons in respect of all other acts. The result would no doubt be chaos. But this only means that the 'logical plenitude' of 'law' is no guarantee of its effectiveness. Its exemplification in social reality requires an adequate content.

The hypothesis certainly satisfies the test of simplicity. Law conceived in this way could be extended to relate all action—even all existence—to the reaction of courts. The earth would logically (though irrelevantly) have the legal liberty to perform its revolutions. Legal thought would become a distinctive and comprehensive mode of thought, relating all experience to one central point—the reaction of courts to that experience. And is not this in fact the way that lawyers think with regard to any conceivable situation—'what will the courts do about it?' The question is whether it is a systematic and profitable mode of thought. Lawyers certainly make their living largely by stating its conclusions. But the legal profession may be one gigantic hoax. If so it is a hoax on which the persistence of what are commonly called legal systems seems to depend. There is a close correlation, as Wigmore has so clearly shown, between the duration of 'legal systems' and the existence of a professional class.

It may be relevant to consider the presuppositions and pretensions of the legal profession. If these are verifiable and prove true, then lawyers are not frauds. It is suggested that lawyers presuppose the existence of courts which will attempt to control by force the actions of men in ways that are reasonably predictable. They further pretend that they can predict the reaction of the courts to possible events, and that the art of prediction can be largely taught through the agency of rationally formulated rules and principles. A further pretension is that just as their predictions about possible situations are of monetary value to the parties concerned so too the conditions which make their predictions possible are of value to the community as a whole. These conditions they call 'the rule of law', which, with Aristotle, they regard as socially preferable to the 'rule of men'. We may conclude that where the presuppositions and pretensions of lawyers are true it appears possible to have a body of systematic knowledge which may reasonably be called the science of 'law' as conceived above.

What are the rules of the lawyers' art of prediction? If their art is a reality and not a mere bluff they must be identical with rules according to which courts find their decisions. Are such rules exemplified in the practice of courts? Not when equity varies with the length of the Chancellor's foot, the common law with the state of the judge's digestion, or statutes are twisted or ignored at the bidding of a dictator or the instigations of a secret police. In such

circumstances there may be room for advocates but none for lawyers, and no science can be built on any conceivable concept of law. But where tribunals are in the habit of deciding cases, not according to their unfettered notions or the strength of the parties, but by paying deference to certain recognised rule-formulating sources, then the mode of thought of these tribunals, with reference to the authoritative sources of decision, must be capable of generalisation. The existence of such tribunals is a verifiable question of fact. It is suggested that the rules of their thought, which make possible the lawyers' art of prediction, may also be called rules of 'law'.

Let us now return to the aim of jurisprudence—'to frame a system of ideas that will account for the events of the legal process'. The first requisite is a concept of law which will designate certain events, relations and processes as legal. The reviewer has suggested two main hypotheses. Firstly that the best way of conceiving law is to conceive it as the rules relating human action (or all experience) to the probable reactions of the courts in attempting to control it. This concept of law follows and accounts for one way in which lawyers think and express their thoughts in advising their clients—'if you do so and so the courts will react thus and thus'.

From this concept of law the notions of liberty and duty may be logically derived. From these the correlatives vulnerability and right. Legal personality is the attribute of those capable of liberties and duties. Titles are the events on which liberties and duties depend. Where titles are acts the actor has power, to which the correlative is liability and the logical alternatives disability and immunity. So-called legal principles, rules and concepts are, generally speaking, generalised or shorthand ways of expressing the existence of liberties, duties, titles, or combinations of them. The second hypothesis is that law may also be usefully conceived as the rules relating the judges' thought to certain sources regarded by them for the time being as authoritative. These are clearly different from the rules in which the lawyer states his conclusions, and which we have already designated 'law'. The general form of such rules would be 'the judges will probably defer to the rules of organisation and action formulated by certain agencies, assigning to them certain priorities and subjecting them to certain modes of interpretation'. This hypothesis accounts for the way judges (and the lawyers following after them) think; for the stability and predictability displayed by so-called legal orders; and at the same time for change —since the agencies regarded as authoritative, whether they be custom, statute, precedent, the imagined revelation of gods, the

supposed 'nature of law itself', or the current ideals of society, may and do vary from time to time. The rules formulated by these sources we should call prescriptive legal norms, imperative in logical form, to distinguish them from the descriptive rules, 'prophetic' in logical form, in which 'law' is formulated for the purpose of legal science.

Further questions remain to be asked. Can the two hypotheses be combined into one comprehensive concept of law? This is little more than a matter of verbal adjustment. The following definition may be suggested. 'Law or a legal system is a complex of rules relating all events of experience—but particularly human action—to the probable reactions of a court or system of courts in effectively authorising the application of force, together with the rules expressing the regularities of the actions of those courts in hearing cases and in deferring to the rule-formulating sources by which the above reactions are supported'.

Can we add anything to make clear the 'existential nature' of law—to indicate the realisation of the concept in social actuality? Perhaps our definition might proceed: '. . . this whole interrelated system of rules—with the implicated court and executive actions, liberties, powers and duties—being continuously realised (or empirically verified) in the expression, liberation, organisation and control of human activity within the area of social life subject to the system'. This puts, as it were, a 'time dimension' into the concept, and the metaphysical status of law becomes one of possibility or probability continuously passing, through time, into actuality.

Does law, thus conceived, account for all the events we may find it useful to designate legal? It explains hardly any of them, but it relates them conceptually in a way which may provide a useful control of further inquiry. To pursue this would involve a whole book, not a short article—and especially one purporting to be a review.

The reviewer has only attempted to show the sort of result which may be reached by following up some of the clues given by Mr. Cairns. If there were thought to be anything of merit in this approach the reviewer would feel obliged to acknowledge his indebtedness, in addition to Mr. Cairns, to the late Professors Whitehead and Collingwood, Mr. Michael Oakeshott, Professor Gilbert Ryle, and above all to Dr. Hans Kelsen who first approached the concept of law by analysis of legal thought.

THE RULE IN *YOUNG* v. *BRISTOL AEROPLANE CO., LTD.*

R. N. Gooderson

The statement of the above rule that appears in the headnote to the case in the *Law Reports* [1944] K.B. 718 is as follows :—

'The Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction, and the "full" court is in the same position in this respect as a division of the court consisting of three members. The only exceptions to this rule are :—

'(1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow;

'(2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords;

'(3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*, *e.g.*, where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.'

It is proposed to offer a few observations on the first two exceptions.

Exception (1)

In a penetrating examination of the rule and the exceptions to it in 9 C.L.J. 349, Professor Goodhart has come to the conclusion that there is a conflict between *Young* v. *Bristol Aeroplane Co., Ltd.*, and the subsequent decision of the Court of Appeal in *Fisher* v. *Ruislip-Northwood U.D.C.* [1945] K.B. 584, as to the scope of the first exception to the rule. This conclusion is rather a startling one, as it seems to involve the submission that Lord Greene, the then Master of the Rolls, who delivered the considered judgment of the court in each case, has been guilty of inconsistency. Such a conclusion would, under any circumstances, be drawn with extreme reluctance, but especially so in that the hearing in the *Fisher Case* was only six months after the delivery of judgment in the *Young Case*, although, owing to the unfortunate illness of Lord Greene, the reasons for the *Fisher* decision were not made known for almost a further six months.

In *Fisher* v. *Ruislip-Northwood U.D.C.* the Court of Appeal held that if a local authority erects an air-raid shelter in the highway it must, while a black-out is in force, take reasonable steps to warn the public of the existence of the obstruction. Before reaching this finding, the court had to consider a number of its own previous decisions in cases where the plaintiff had, during a black-out, come into collision with an unlighted obstacle placed in the highway by the defendant acting under statutory powers. In the earliest of these, *Morrison* v. *Sheffield Corporation* [1917] 2 K.B. 866, where the plaintiff had walked into unlighted spikes protecting trees in the highway, the defendant corporation was held liable for the resulting injury. In three subsequent cases, *Wodehouse* v. *Levy* [1940] 2 K.B. 561, where the plaintiff, a fare in a taxi, was injured when the taxi ran into an unlighted bollard in the middle of the highway, *Lyus* v. *Stepney Borough Council* [1941] 1 K.B. 134, where the plaintiff, a pedestrian, collided with an unlighted unwhitened sand-bin, and *Fox* v. *Newcastle Corporation* [1941] 2 K.B. 120, where the plaintiff, a cyclist, rode into an unlighted air-raid shelter, the Court of Appeal gave judgment in each case for the defendant, holding that there was no duty on local authorities to warn persons using the highway during a black-out of such obstructions. In the *Fisher Case*, where a motorist came into collision with an unlighted air-raid shelter, the court decided that the three cases of *Wodehouse*, *Lyus* and *Fox* could not be reconciled with the *Morrison Case*. It therefore held that it had jurisdiction to choose between the two different views, and preferred to follow the *Morrison Case*. This conclusion was reached despite the fact that in the *Lyus Case* the *Morrison Case* had been considered, and that the court had held it to be a decision on the special facts and not in conflict with the *Wodehouse Case*, which the court proceeded to follow.

The ruling in *Fisher* v. *Ruislip-Northwood U.D.C.* is, therefore, that the court is entitled to decide which of two conflicting decisions of its own in cases A and B it will follow even though the decision in case A was brought to the attention of the court in case B. Professor Goodhart is of the opinion that this decision extends the exception as originally stated in the *Young Case*, and is in conflict with it. With submission there is no conflict. Professor Goodhart suggests that the first exception, as originally stated in the *Young Case*, is confined to cases where the conflict arose because the decision in case A was overlooked by the court in case B. He supports his view by two quotations from the judgment of Lord Greene in the *Young Case*. The first passage, at p. 722, is as follows : ' It is a conclusive answer to this submission that *Kinneil's*

Case was cited to this court in *Perkins' Case*. Mr. Paull's argument, therefore, involves a submission that in *Perkins' Case* this court, with the relevant authorities before it, came to a wrong decision'. Professor Goodhart observes that it is odd to find the argument, which was rejected in the *Young Case*, accepted by the court in the *Fisher Case*, the *Lyus Case* not being followed although the conclusion in that case had been arrived at after a consideration of all the relevant authorities. But, with respect, the argument is a different one from that accepted in the *Fisher Case*. Mr. Paull's argument in the *Young Case* was based on the second exception, that the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot stand with a decision of the House of Lords. The court was invited to refuse to follow the decision of the Court of Appeal in *Perkins* v. *Stevenson & Sons, Ltd.* [1940] 1 K.B. 56, as inconsistent with the earlier decision of the House of Lords in *Kinneil Cannel and Coking Coal Co.* v. *Sneddon* [1931] A.C. 575. Mr. Paull's submission and the decision of the court rejecting it had no reference to the first exception regarding conflicting authorities in the Court of Appeal, which was the exception under consideration in the *Fisher Case*.

The second quotation on which Professor Goodhart places reliance is from a passage at p. 729, which may be quoted in extenso: 'Two classes of decisions *per incuriam* fall outside the scope of our enquiry, namely, those *where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow*; and those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords'. Professor Goodhart quotes only the italicised portion of this passage, and remarks that in the *Lyus Case* the court did not act in ignorance of the *Morrison Case*, and yet the *Morrison Case* was preferred to it, while the *Young Case* says that the conflict must be due to ignorance of the previous decision. But, with respect, Lord Greene is dealing only with the third exception, the instances of *incuria*. If Professor Goodhart's contention were sound, the first exception would be redundant. Lord Greene is, it is submitted, merely stating that this class of *incuria* is already covered by the first exception, and not that the first exception covers only this case. If that were the intention it would be simpler to discard the first exception altogether, and include the case of conflict through ignorance of a previous decision under the third exception.

The opinion that it is fallacious to suppose that the court in the

Young Case intended to confine the first exception to the case of a conflict arising through ignorance of a previous decision receives support from the judgment in *Battersby* v. *Anglo-American Oil Co., Ltd.* [1945] 1 K.B. 23. In this case a division of the Court of Appeal, consisting of Lord Greene and two other members of the court in the *Young Case*, reached a conclusion similar to that in the *Fisher Case*. This case came up for hearing little more than two months after the delivery of the judgment in the *Young Case*, and it does not seem that in the meantime any other case was heard by the court because of the Long Vacation. The *Young* judgment was delivered on the last day but one of the Trinity Sittings, and the *Battersby Case* seems to have been the first case of the Michaelmas Sittings, the hearing actually taking place late in the Vacation and the considered judgment being delivered on the second day of Term. One would not, therefore, expect to find inconsistency between the two decisions, and it is submitted there is none. The court held in the *Battersby Case* that there was no discretion to renew a writ after the period for service had expired, so as to deprive the defendant of the benefit of a limitation which had accrued. The court refused to follow a decision of its own in *Holman* v. *George Elliott* [1944] 1 K.B. 691, as in conflict with several earlier decisions of the court, notably *Doyle* v. *Kaufman* (1877) 3 Q.B.D. 340, and *Hewett* v. *Barr* [1891] 1 Q.B. 98. The significant factor is that the *Doyle* and *Hewett Cases* were considered by the court in the *Holman Case*.

Professor Goodhart raises an independent point regarding the *Fisher Case*. He suggests that, quite apart from his view that the *Fisher Case* is in conflict with the *Young Case*, it destroys the authority of the *Young Case* itself, because, in the latter case, the court acknowledged that *Wynne-Finch* v. *Chaytor* [1903] 2 Ch. 475 was in conflict with the conclusion it had just reached. In the *Wynne-Finch Case* the Court of Appeal had held that it was not bound by its own previous decisions. Professor Goodhart poses the question : ' Does this mean that in a future case the Court of Appeal may disregard the *Young Case*, and hold that, as there has been a conflict in previous decisions, it is not absolutely bound by its prior judgments? ' The answer to this question appears to be that, assuming the conflict creates a position within the first exception even though the previous decision had been considered by the later court (and there is no reason to doubt this), the Court of Appeal cannot now disregard the *Young Case*. In the *Wynne-Finch Case* in 1903 the court held it was not bound by its own previous decisions. In several cases, notably *Velazquez, Ltd.* v. *Inland Revenue Commissioners* [1914] 3 K.B. 458, the opposite was held.

In the *Young Case* in 1944 the court made a choice between these authorities, as was its duty, because of the conflict, and preferred the *Velazquez Case*. It is submitted that a court sitting in 1950 cannot now say that, because of the conflict, it has jurisdiction to choose, and prefer the *Wynne-Finch Case* : the conflict is now ended. There seems to be no authority in support of this opinion, but there is nothing contrary to it decided in the *Fisher Case*. The view now proposed, stated in general terms, is that if the court in case A reaches one conclusion, and the court in case B reaches another conclusion, the court may, in case C, if it decides there is a conflict between the two, prefer, say, case A, but it would not be open to the court in case D to prefer case B, because the conflict is now at an end. All that the *Fisher Case* decides is that, if the court in case C decides that there is no conflict between cases A and B and follows case B, it is open to the court in case D to hold that there is a conflict between case A on the one hand and B and C on the other, and prefer case A. This is what happened in the *Fisher Case*, case A being the *Morrison Case*, case B the *Wodehouse Case*, case C the *Lyus Case*, and case D the *Fisher Case*.

Although with submission the *Fisher Case* does not conflict with the *Young Case* or destroy its authority, it leads to a situation difficult to justify. If the Court of Appeal holds that its previous decisions in cases A and B do not conflict, that decision is not binding, according to the *Fisher Case*, but, if it holds that there is a conflict and makes a selection, that choice is binding upon a subsequent court. It is suggested that this is an unreasonable and an unnecessary distinction. It is unnecessary, because the *Fisher Case* can be supported on another ground, albeit a narrow one, and supported it should be, so far as the actual decision is concerned, as an outstanding contribution to the law regarding the duties of local authorities. Its contribution to the rule under discussion is not, however, beneficial, and it should be restrictively distinguished on the ground that the court rejected the *Lyus Case* because it conflicted not merely with the *Morrison Case*, but also with *Polkinghorn* v. *Lambeth Borough Council* (1938) 158 L.T. 127. Now the *Polkinghorn Case* was not cited in the *Lyus Case*, so that it is arguable that all the relevant authorities were not before the court.

There is, moreover, a later decision of the Court of Appeal, *Hogan* v. *Bentinck Collieries* [1948] 1 All E.R. 129; 40 B.W.C.C. 268, where a conclusion as to the scope of the first exception different from that in the *Fisher Case* was reached. There the court, consisting of Lord Greene M.R., Bucknill and Asquith L.JJ., was faced with the previous decision of the court in *Rothwell* v. *Caverswall Stone Co., Ltd.* [1944] 2 All E.R. 350. In the *Rothwell Case* the court

reluctantly held itself bound by a line of previous decisions of the court, beginning with *Humber Towing Co., Ltd.* v. *Barclay*, 5 B.W.C.C. 142, to hold that a workman, who would otherwise be entitled to compensation arising out of an injury, but whose injury was aggravated by the negligence of his doctor, was prevented from recovering against his employer. Counsel for the workman argued that the *Humber* line of cases was inconsistent with another decision of the Court of Appeal in *Dunham* v. *Clare* [1902] 2 K.B. 292, and prayed in aid the first exception to the *Young* rule, but the court held, Scott L.J. dissenting, that there was no conflict between the *Humber* and *Dunham Cases*. Now in *Hogan* v. *Bentinck Collieries* it was surely open to the court to prefer the dissenting judgment of Scott L.J., and to reject the majority view, just as in the *Fisher Case* they had rejected the *Lyus* decision, but Lord Greene M.R., who was not referred by counsel to his own judgment in the *Fisher Case*, and the other members of the court in an unconsidered judgment decided with regret against the workman. Speaking of the *Rothwell Case* at p. 132, Lord Greene said : ' The majority of the court, however, did not think the decisions were inconsistent and so came to the conclusion that they were not put into the position contemplated by *Young* v. *Bristol Aeroplane Co.* of having to choose between inconsistent authorities. We are, of course, bound under the principles of *Young* v. *Bristol Aeroplane Co.* to accept that decision '. In 40 B.W.C.C. 268, 276, his Lordship is thus reported : ' We cannot go behind their judgment and say there was an inconsistency when they, after consideration, have found there was not '.

It is suggested that this conflict between the *Fisher Case* and the *Hogan Case* should be resolved by the Court of Appeal if and when the opportunity arises in favour of the *Hogan Case*.

Exception (2)

There is, it is submitted, a conflict, as to the scope of the second exception, between the *Young Case* and the subsequent decision in *Fitzsimmons* v. *Ford Motor Co., Ltd.* [1946] 1 All E. R. 429, where Lord Greene was not a member of the court. Professor Goodhart discusses the *Fitzsimmons Case* at some length, though he does not advert to this conflict. Here the Court of Appeal refused to follow three previous decisions of its own, *Steel* v. *Cammell Laird and Co., Ltd.* [1905] 2 K.B. 232, *Williams* v. *Guest, Keen and Nettlefolds* [1926] 1 K.B. 497, and *Cole* v. *London and North Eastern Ry.* (1928) 21 B.W.C.C. 87, as they were not consistent with the decision of the House of Lords in *Burrell and Sons, Ltd.* v. *Selvage* (1921) 14 B.W.C.C. 158. The crucial point

is that two of the Court of Appeal decisions came after the *Burrell Case*, and in both of them the *Burrell Case* was cited, discussed and distinguished.

Curiously enough, although the *Fitzsimmons Case* is reported in four sets of reports, in none is there any express reference to *Young* v. *Bristol Aeroplane Co., Ltd.*, either in the arguments of counsel or in the judgment of the court, but Professor Goodhart regards it as a decision interpreting the *Young Case* and, with respect, rightly. The view that the court, which consisted of Scott L.J., a member of the 'full' court in the *Young Case*, Somervell L.J. and Vaisey J., had the *Young Case* in mind is borne out by the fact that the next day a similarly constituted court had to consider *Wilson* v. *Chatterton* [1946] K.B. 360, where there was some discussion of the *Young* rule and the exceptions to it, and a decision analogous to that in the *Fitzsimmons Case* was reached. In *Wilson* v. *Chatterton* the court was confronted with its own previous decision in *Lander* v. *British United Shoe Machinery Co., Ltd.* (1933) 102 L.J.K.B. 768, which it was reluctant to follow. It held that the 1933 case was inconsistent with general principles laid down by the House of Lords in four cases in 1903, 1910, 1914 and 1940 respectively. Thus three of the House of Lords decisions preceded the Court of Appeal case of 1933. Though none of these House of Lords cases was cited in the *Lander Case*, it has been pointed out in a note in 62 L.Q.R. 210 that these previous House of Lords decisions must have been well known to the court, and could not have been passed over *per incuriam*. Nevertheless the *Lander Case* was treated as bad law. It would appear, therefore, from the *Fitzsimmons Case* and from *Wilson* v. *Chatterton* that, where a House of Lords decision precedes a Court of Appeal decision, the Court of Appeal in the case *sub iudice* is bound to follow the House of Lords decision, if, in the opinion of the court, the later Court of Appeal case is inconsistent with it, even though the House of Lords case was cited to the Court of Appeal.

This is the very view rejected by Lord Greene in the passage already quoted from the *Young Case* at p. 722, where his Lordship rejects Mr. Paull's argument that *Perkins' Case* in the Court of Appeal is inconsistent with the previous House of Lords decision in *Kinneil's Case* on the ground that the argument involves the submission that the Court of Appeal with the relevant authorities before it came to a wrong decision. Moreover at p. 725 in his judgment he described the second exception in these words: 'The third (class of case) is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a *subsequent* decision of the House of Lords'. The *Young*

Case is reported in several sets of reports, but in all except one the vital word 'subsequent' is omitted from the head-note, presumably because in Lord Greene's final summary at p. 729 it does not find a place: the *Law Journal* reporter in 113 L.J.K.B. 513, however, includes it, and it is submitted his summary of the effect of the case is the accurate one.

In *Williams* v. *Glasbrook Brothers, Ltd.* [1947] 2 All E.R. 884 the same view is taken of the second exception as in the *Young Case*, but the *Fitzsimmons Case* is not cited to the court, and no member of the court in the *Fitzsimmons Case* is on the bench. Here the Court of Appeal found that the facts were indistinguishable in any relevant respect from its own previous decision in *Wilds* v. *Amalgamated Anthracite Collieries, Ltd.* [1947] 1 All E.R. 551. It was, however, argued for Glasbrook Brothers that *Wilds' Case* could be distinguished, as inconsistent with an earlier decision of the House of Lords in *Jones* v. *Amalgamated Anthracite Collieries, Ltd.* [1944] 1 All E.R. 1. The Court of Appeal held that it was not admissible for counsel so to argue, and Lord Greene said at p. 884: 'In my opinion, even assuming that it were the fact that this court did misunderstand the decision of the House of Lords in *Jones' Case*, that does not justify us in refusing to follow *Wilds' Case* today. If in *Wilds' Case* this court thought that the House of Lords in *Jones' Case* decided something that it did not, nobody but the House of Lords can put that mistake right. There is all the difference in the world between such a case as that and the matters to which we referred in our judgment in *Young* v. *Bristol Aeroplane Co., Ltd.*, as, for instance, where a subsequent case in the House of Lords is found either expressly or by implication in effect to overrule an earlier decision of the Court of Appeal. No doubt if *Jones' Case* had been subsequent to *Wilds' Case*, it would have been open to counsel for the employers (Glasbrook Brothers) to argue that *Jones' Case* impliedly overruled *Wilds' Case* and we should have had to decide whether he was right or wrong'.

It is particularly unfortunate that different divisions of the Court of Appeal should have come to opposite conclusions as to the ambit of this second exception, without being referred by counsel in either case to the contrary view, as there seems to have been already a conflict of authority on this question even before the *Young Case*. In *English, Scottish and Australian Bank* v. *Commissioners of Inland Revenue* ([1932] A.C. 238, in the House of Lords), the Court of Appeal, without delivering reasoned judgments, held itself bound by its own previous decision in *Velazquez, Ltd.* v. *Inland Revenue Commissioners* [1914] 3 K.B. 458. The appellants' case was that in the *Velazquez Case* the court had misunderstood the effect of a

previous House of Lords decision in *Commissioners of Inland Revenue* v. *Muller and Company's Margarine, Ltd.* [1901] A.C. 217, which had been considered in the *Velazquez Case*, but the appellants conceded that this argument was not open to them until the House of Lords. In the House of Lords, Lord Buckmaster (at p. 242) held this to be the proper course. This is the view that was later to find favour with the Court of Appeal in *Williams* v. *Glasbrook Brothers, Ltd.*

On the other hand, in *Lyus* v. *Stepney Borough Council* [1941] 1 K.B. 134, 152, the Court of Appeal was prepared to refuse to follow its own previous decision in *Morrison* v. *Sheffield Corporation* [1917] 2 K.B. 866, as inconsistent with an earlier decision of the House of Lords in *Great Central Ry.* v. *Hewlett* [1916] 2 A.C. 511, although the latter case had been considered by the court in the *Morrison Case*. Moreover, in *Noble* v. *Southern Ry.* [1940] A.C. 583, Lord Wright, in the House of Lords, found that a previous decision of the Court of Appeal in 1927 was inconsistent with prior and subsequent decisions of the House of Lords, and, at p. 598, gave it as his opinion that the Court of Appeal, when faced with a decision of its own manifestly inconsistent with decisions of the House of Lords, should apply the law laid down by the House of Lords and refuse to follow the erroneous decision. The attitude of the court in the *Lyus Case* is similar to that adopted in *Fitzsimmons* v. *Ford Motor Co., Ltd.*

What then is the position today in view of the conflict of authority? It is probable that the scope of the second exception will be limited, in accordance with the view in the *Young Case* and in *Williams* v. *Glasbrook Brothers, Ltd.* It is true that in the *Young Case* the court disclaimed any higher power on the part of a 'full' court, but the decision of a 'full' court is in practice likely to be treated with great respect. If this is correct, the first and second exceptions are treated differently. Where conflicting decisions of the Court of Appeal are concerned, the argument is admissible that the court with the relevant authorities before it came to a wrong conclusion: *Battersby* v. *Anglo-American Oil Co., Ltd.*, *Fisher* v. *Ruislip–Northwood U.D.C.*, but this is not so where the court had considered and misunderstood a prior House of Lords decision: *Young* v. *Bristol Aeroplane Co., Ltd.*, *Williams* v. *Glasbrook Brothers, Ltd.* There seems to be no good reason for this distinction.

If the *Fitzsimmons Case* is preferred, as it is submitted it should be, a further difficulty arises from the *Fisher Case*, which then becomes an important authority on the second exception. In the previous case of *Lyus*, the Court of Appeal had held that there was

a conflict between the House of Lords decision in the *Hewlett Case* and the subsequent Court of Appeal decision in the *Morrison Case*, where the *Hewlett Case* had been discussed and distinguished, and was prepared to refuse to follow the *Morrison Case*. In the *Fisher Case* the court holds that there is no conflict between the two authorities and follows the *Morrison Case*. It is therefore permissible for the Court of Appeal to resuscitate a Court of Appeal decision that a previous Court of Appeal purported to have killed as inconsistent with a prior House of Lords decision.

Even if *Williams* v. *Glasbrook Brothers, Ltd.* is preferred to the *Fitzsimmons Case*, it can be argued from the *Fisher Case* that the Court of Appeal has this power to bring to life apparently defunct authority where a House of Lords decision is ignored by a later Court of Appeal decision, or the House of Lords passes no considered opinion on an earlier Court of Appeal decision, and in either event a subsequent Court of Appeal, finding a conflict, follows the House of Lords decision, disapproving the Court of Appeal decision that it considers inconsistent. It seems to follow from the *Fisher Case* that the Court of Appeal has the power at a later date to decide that there is no conflict with the House of Lords decision, and once more establish the disapproved Court of Appeal authority. It is suggested that to concede this power to the Court of Appeal is contrary to the principle of the *Young Case*, though not in direct conflict with it.

Professor Goodhart states the case against the rule and exceptions, as laid down in the *Young Case*, with considerable force, but he does not clearly indicate what rule he himself would substitute. The only alternatives seem to be, either to lay down a more absolute rule permitting few if any exceptions, or to give the court power to disregard its own previous decisions at will.

The first alternative would clearly increase the certainty in application of the rule. The second exception could be restricted to the case of failure to notice a previous decision of the House of Lords. The third exception would remain so far as decisions reached in ignorance of a statute or statutory rule were concerned. Some provision would have to be made for cases of conflict at present dealt with by the first exception. Professor Goodhart suggests that in such a case the court should be absolutely bound by its last judgment. It is submitted that logically the earlier case should be the binding authority, because in theory the court in the later case had no jurisdiction to come to a conflicting conclusion. The disadvantage of either rule is that, whether the earlier or the later decision is to be the binding one, it is a rule of thumb,

whereas under the exception as now interpreted the court in the case *sub iudice* has an opportunity to decide in accord with its idea of justice.

Any enthusiasm for a rule giving complete freedom to refuse to follow previous decisions is likely to be damped by the article of Professor Powell in 37 H.L.R. 545, in which he describes the conflicting decisions in the State and Supreme Courts of the United States of America on the question of Minimum-Wage Legislation. In America the Supreme Court is not bound by its own previous decisions, nor are the State courts bound by their own previous rulings. The unfortunate situation in America arose because of the position of the courts as guardians of the constitution, but, making due allowance for the different circumstances in the two countries, the struggles in America on this question indicate that complete freedom may give rise at the worst to opportunities of abuse, and at the best to infringement of the golden rule that justice must not only be done, but must appear to be done.

Apart from the evils of uncertainty, the effect of giving the court power to disregard its previous decisions would be, as was argued in the *Young Case*, to create an intermediate court between the Court of Appeal and the House of Lords. It is frequently suggested that the two appellate courts be amalgamated. Surely there is no denial of justice in limiting a party to one appeal, that is to the House of Lords, in a case where the Court of Appeal has passed upon the point at issue in a previous decision. The question of the sometimes prohibitive expense of the appeal raises a wider and quite separate issue.

One of Professor Goodhart's many objections to the absolute rule is that judgments that are wrong or inconvenient will be avoided by circuitous and furtive means, such as the method of drawing fine distinctions, or the method of treating a question of law merely as a question of fact. As to the first method, this has been dealt with by Professor Goodhart himself in 50 L.Q.R. 40, where he ascribes to the common law doctrine of precedent the virtue of certainty. He deals with the argument of the American realists, such as Jerome Frank, that certainty is an illusion, and that, even when principles are apparently clear, the courts may escape from their effects by subtle distinctions, in the following passage at p. 59: 'It is of course possible to point to exceptional cases, but we do know that in practice English courts recognise that they are bound by precedents, and that no attempt is made to escape from them if they are clearly in point'. He compares the argument that English courts do not follow precedent where they wish to escape with the argument that officers of the British

Navy do not obey their admirals because Nelson clapped his telescope to his blind eye at Copenhagen. We thus have Professor Goodhart's own assurance that such instances are rare.

Professor Goodhart illustrates the second method, the method of, in effect, overruling an inconvenient decision by treating it as based merely on a question of fact and not of law, by the case of *Tidy* v. *Battman* [1934] 1 K.B. 319. There the Court of Appeal was faced with its previous decision in *Baker* v. *Longhurst and Sons, Ltd.* [1933] 2 K.B. 461, where it was held that a motorist, who is injured as a result of driving into the back of an unlighted vehicle at night, must be guilty of negligence, as either he was going at a pace at which he could not stop within the limits of his vision, or he was not looking out. In the *Tidy Case* the court held this to be a pure question of fact in each case. Professor Goodhart deplores the use of the Nelson touch in the *Tidy Case*, the necessity for which arose, in his opinion, from the rule of absolute precedent, for otherwise the *Baker Case* would have been openly overruled. It seems, however, that the court genuinely misunderstood the *Baker Case*. This is borne out by the fact that in the *Tidy Case* even the learned county court judge had left the point to the jury as a question of fact, although the *Baker Case* had been cited to him. County court judges are not in the habit of deliberately disregarding apposite rulings of the Court of Appeal. Moreover, even where an appellate court has power to overrule, it is a not uncommon practice for the court to prefer to distinguish with subtlety rather than to overrule with finality. This habit does not spring entirely from the need to avoid precedents otherwise binding.

There is at least nothing furtive about the exceptions expressly laid down in the *Young Case*. Differences of opinion have already arisen as to the ambit of these exceptions, but this was to be expected of the first attempt at express formulation. There will be more certainty in the application of the exceptions as their scope becomes better understood by the bench and the bar. Professor Goodhart in his article in 50 L.Q.R. 40, 58, denies the common law doctrine of precedent the virtue of flexibility, though he concedes that it achieves certainty. Sir William Holdsworth, replying to this criticism in 50 L.Q.R. 180, 193, claims both these virtues for the doctrine: 'The reservations with which the English method is accompanied provide opportunities for further experiments. . . . I think in fact that it is true to say that it hits the golden mean between too much flexibility and too much rigidity. . . . If it gives less flexibility than the continental system it also gives more certainty'. It is too early to claim that the rule laid down in the *Young Case* with its exceptions will in practice hit this golden mean.

In every case mentioned by Professor Goodhart where an exception has been applied he agrees that a just result has been achieved, but it must be conceded that the application of the exceptions is in fact proving difficult.

Summary

It may be convenient in conclusion to attempt to restate the ambit of the first two exceptions in the light of cases decided since *Young* v. *Bristol Aeroplane Co., Ltd.* :—

(1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow, whether the second decision was reached in ignorance of the first, or the first decision was discussed and distinguished in the second. (The rider to the formulation of the exceptions in the *Young Case* is the product of the subsequent decisions in *Battersby* v. *Anglo-American Oil Co., Ltd.* and *Fisher* v. *Ruislip-Northwood U.D.C.*)

It appears that when the court has once decided that there is a conflict between two or more previous decisions and purported to resolve it that resolution is final in the sense that a subsequent court cannot then prefer the rejected decision. It is doubtful whether it is open to a subsequent court to decide there was no conflict at all, but it is suggested that no such power should be conceded, although *Fisher* v. *Ruislip-Northwood U.D.C.* permits it where the second exception is concerned.

When the court has once decided that there is no conflict between two or more previous decisions, it is not open to a subsequent court to hold that there is in fact a conflict and thereby confer upon itself jurisdiction to make a selection: *Hogan* v. *Bentinck Collieries*. *Fisher* v. *Ruislip-Northwood U.D.C.* is to the contrary, but should be overruled on this point. The Court of Appeal has, of course, power to choose between these two conflicting authorities when the point again comes before it.

(2) The court is bound to refuse to follow a decision of its own which was reached in ignorance of a previous decision of the House of Lords that covers the point, or which, though not expressly overruled, cannot, in its opinion, stand with a subsequent decision of the House of Lords, or which is expressly disapproved in considered dicta by a majority in the House of Lords: *Leathley* v. *John Fowler and Co., Ltd.* [1946] K.B. 579.

Where the House of Lords decision comes first, and the decision is discussed and distinguished in the later Court of Appeal decision, the Court of Appeal in the case *sub iudice* is bound by the Court of Appeal decision according to *Young* v. *Bristol Aeroplane Co., Ltd.*

and *Williams* v. *Glasbrook Brothers, Ltd.*, but according to *Fitzsimmons* v. *Ford Motor Co., Ltd.*, is under a duty to follow the House of Lords decision if, in its opinion, there is a conflict. There is stronger authority in support of the *Williams* v. *Glasbrook Brothers, Ltd.* decision, that of a 'full' court, but the ruling in the *Fitzsimmons Case* should be preferred, as it is unreasonable to treat the first and second exceptions differently. The Court of Appeal has, of course, power to choose between the two lines of authorities when the question next arises.

If the *Fitzsimmons Case* is preferred, it has been held in *Fisher* v. *Ruislip-Northwood U.D.C.** that a subsequent court can decide that there was no conflict at all, and revive the discarded Court of Appeal decision, but it is suggested that this view should not be followed.

(* Note.—*Fisher* v. *Ruislip-Northwood U. D. C.* thus seems to be authority for the following propositions:—

Exception (1)

(i) The exception is not confined to cases of *incuria*. This is also laid down in *Battersby* v. *Anglo-American Oil Co., Ltd.*

(ii) Where the Court of Appeal in case C has decided that there is no conflict between its own decisions in cases A and B and follows case B, it is open to the court in case D to hold there is a conflict between cases A and B, and to prefer case A, overruling case B.

But *Hogan* v. *Bentinck Collieries* is to the contrary and should be followed.

Exception (2)

Where the Court of Appeal in case C has decided that there is a conflict between case A in the House of Lords and case B in the Court of Appeal, and has rejected case B on the ground of inconsistency in any of the following circumstances:—

(a) Case A was ignored in Case B, or;

(b) Case B preceded case A, but no considered opinion was passed upon case B in case A, or

(c) Case A was discussed and distinguished in case B,

it is open to the Court of Appeal in case D to decide that there is no conflict at all between cases A and B, and to follow case B, distinguishing case A. (a) and (b) are not implicit in the decision, but seem to follow logically from it. (c) will apply only if the *Fitzsimmons Case* is approved in preference to *Williams* v. *Glasbrook Brothers, Ltd.*)

THE JEWISH ARCAE

K. Scott

In September, 1194, Richard I, having returned from a disastrous captivity, sent itinerant justices around the country to reclaim and reorganise royal rights. According to Roger of Hoveden,[1] they were instructed to put into writing all lands, houses, rents and possessions of the Jews. They should also provide six or seven places in which the Jews should make all their contracts, and appoint two law-worthy Christians, two law-worthy Jews and two law-worthy writers before whom, together with William de Sanctae Mariae Ecclesia and William de Chemilli, such contracts should be made. The charter embodying the contract was to be made in the form of a chyrograph,[2] of which one part was to be kept by the Jew, sealed with the seal of him to whom the money was lent: the other part should remain in the arca [arca=chest=huche]. The arca was to be secured by three locks: the Christians were to have one key, the Jews a second and the two Williams a third, and they should each of them seal the lock the key of which they held. The clerks of the two Williams should keep a roll of the transcripts of all charters: they were exhorted to keep the roll up to date, in return for which they were to receive one penny for every charter made, twopence going between the writers, the total payment of threepence being levied equally from the debtor and creditor. Five or more of the appointed officials were required to be present at each transaction, and the three groups, the Christians, the Jews and the keepers of the rolls were each to maintain a roll embodying payments made to the Jews.

The particular arrangement envisaged by these instructions seems to have had but a short life, but a similar system was present in this country until, in 1290, the Jews were expelled, and the records of their dealings were centralised under the King's hand in Westminster.

The Jews of England seem to have entered the country soon

[1] *Chronica Rogeri de Hoveden*, ed. Stubbs, vol. III, p. 266.

[2] A deed attested by witnesses, which, when containing mutual covenants, was usually made in the form of a part and counter part, between which was drawn the word 'Chyrographum'; the document was then cut asunder, through the word, in an indented manner. The authenticity of the document was proved by fitting the two parts together.

after the Conquest [3] and when we get a first clear view of their activities it seems that they were but little controlled. In the twelfth century as business men, financiers and merchants they spread their net very widely.[4] The charters which they held from the Crown [5] gave them free and honourable residence in the realm and confirmed them in the possession of their lands and fees, mortgages and goods and all their liberties and customs: they were granted procedural advantages and were free to travel throughout the realm. By John's charter they were allowed to sell any pledge after the passing of a year and a day. These privileges, however, have to be read against the social background in which the Jews were living. In truth, they were continuously the object of popular suspicion, and their existence to a large extent depended upon royal favour. When the composer of 'the Laws of Edward the Confessor' interpolated the remark that Jews ought to be under the guard and protection of the King's liege and that none of them ought to place himself under any man without the King's licence because the Jews themselves and all theirs belong to the King, he was expressing something which was the truth. The Crown and the Jews were working in close partnership but the Jews depended upon the support of the Crown for their welfare. In return the Crown derived monetary and administrative benefit from the Jews. The Jew paid money to the Crown whenever he entered or left the country, when his son married, when he moved from one place to another, and on his death at least one-third of his property went directly to the Crown. In addition the Jew could hardly hope to enforce his debts without the support of royal writs, for which he paid dearly, while continuously the Crown threatened him and his community with a tallage to meet the extraordinary needs of the Crown, at a rate higher than that levied against other classes of the community.

The profitability to the Crown of the Jew depended upon his pursuing his vocation in peace. In 1190 that peace was rudely broken. Already in 1189 at Richard's Coronation a massacre of the Jews in London had taken place, and in 1190 at Norwich, Stamford, Bury St. Edmunds, King's Lynn, Lincoln and York further wholesale slaughters occurred. At York in particular, the

[3] Cf. the pioneer work of Jacobs: *The Jews of Angevin England*, pp. 3–6, and the recent scholarly work of Roth, *History of the Jews in England*, 2nd ed., pp. 1–17.

[4] Cf. Jacobs, *op. cit.*, pp. 14–15, 28–29, 38–45, etc., Knowles, *Monastic Orders in England*, pp. 353–4, and the well-known account by Jocelyn de Brakelonde: *Jocelini Cronica* (Memorials of St. Edmunds, vol. 1, 210): Roth, *op. cit.*

[5] Cf. Rymer, *Foedera*, 1, 51 (Richard I) and Rot.Cart. 1, 66 (John) referring to a charter of Henry I.

massacre was followed up by a spoliation of the Jewish records which had been deposited in the Minster. In each of these cases not only the Jews but the Crown also was a loser.

Richard's new organisation therefore had as its main object the securing of the Crown's property in the Jews by concentrating their activities in centres where they could be controlled and protected. It is not certain where the first arcae were set up. Roth suggests that it is likely that they existed in London, Lincoln, Norwich, Winchester, Canterbury and Oxford and, possibly, in either Northampton, Cambridge, Gloucester, Nottingham or Bristol, all of which had arcae in later times.[6] By the time we have clear evidence of the location of the arcae, it is clear that the limitation of their numbers to six or seven has gone by the board. In the thirteenth century we can trace twenty-seven separate arcae, although not all were in existence at the same time.[7] In 1242, for example, the Jews of Berkhamsted, together with their chest, were moved to Wallingford, and in 1275, at the instigation of Eleanor, mother of Edward I, who did not wish to have Jews in towns which were part of her dower estate, the Jews of Marlborough were removed to Devizes, those of Gloucester to Bristol, those of Worcester to Hereford and those of Cambridge to Huntingdon.[8]

Other features of the original scheme were also altered in the course of time. William de Sanctae Mariae Ecclesia (later Bishop of London) and William de Chemilli represented the King's Exchequer's control of the organisation.[9] Within four years, this control was organised under a separate department of the Exchequer, known as the Exchequer of the Jews, headed by the Justices or Wardens of the Jews, many of whose rolls have been edited by Rigg and Jenkinson.[10] The original division between the Christian and Jewish chyrographers was retained, but the method of their appointment was developed. The procedure was for the Justices of the Jews to order the sheriff to impanel a jury normally

[6] Roth, *op. cit.*, p. 29.

[7] Gross, *The Exchequer of the Jews of England*, p. 20. In addition to those listed above, arcae existed at Bedford, Berkhampsted, Colchester, Devizes, Exeter, Hereford, Huntingdon, Leicester, Marlborough, Stamford, Sudbury, Wallingford, Warwick, Wilton, Worcester and York. Gross, *op. cit.*, p. 20, n. 47.

[8] *Select Pleas, Starrs and other Records*, ed. Rigg, p. 85 (hereafter called '*Select Pleas*'). The policy of having numerous local arcae contrasts with the Statute of Acton Burnell, 1283, from the provisions of which Jews were excluded, and which set up three registries for debts, before the Mayors of London, York and Bristol: Plucknett: *Legislation of Edward I*, p. 138. The three registries were later supplemented by others under the authority of the Statute of Merchants, 1285.

[9] Roth, *op. cit.*, p. 28.

[10] *Calendar of the Plea Rolls of the Exchequer of the Jews*, vols I, II and II, hereafter referred to as *Cal.Plea Rolls*.

of twelve, made up of equal numbers of Jews and Christians who proceeded to choose a chyrographer.[11] That chyrographer was then required to find two pledges for his faithful performance of his office, his name and the names of his pledges being reported by the sheriff to the Justices of the Jews. It is uncertain before whom the new chyrographer took his oath of office. The normal procedure seems to have been for the sheriff to administer the oath,[12] but occasionally the justices themselves seem to have received his oath.[13] The Clerks to the Chest seem to have been appointed in the same way.[14] As for the distribution of the keys of the arca amongst these officials, the system varied, a case occurring where one Christian and two Jews of Stamford each held a key of their local arca.[15] It seems unlikely that the Justices of the Jews held a key to each arca, as was contemplated in the original scheme. Whenever the Crown wished to close an arca, the procedure seems to have been to have it locked and sealed with the seals of local royal officials.[16] It should finally be noted with regard to the personnel of each arca that in the Articles concerning the Jewry which were published between 1284 and 1286, the number of Christian chyrographers is increased to three. There is, however, no evidence that this provision was ever put into effect.[17]

Before these officials all Jewish transactions were supposed to be carried out and there is ample evidence of the activities of the chyrographers and their clerks in these matters. In 1244 Nicholas of Ardern accounted to the Exchequer for the payment of a debt owed to the Jew David of Oxford by a tally written in the hands of the chyrographers.[18] In the same year they are seen controlling the payment of monies under a contract of sale of a horse,[19] and refusing to receive the charters of a transaction for inclusion in the arca since, in their view, they were made *sub pœna*.[20] In 1253 they were assumed to have investigated whether one of the parties to

[11] Cf. *Cal.Plea Rolls*, I, p. 82; III, p. 42. *Select Pleas*, p. 11; Close Rolls, 1265, p. 42.
[12] *Cal.Plea Rolls*, I, p. 82.
[13] Cf. *Cal.Plea Rolls*, I, p. 153, II, p. 43 : cf. also I, 150, for an interesting case of the Lord Edward and the Lord Edmund securing the appointment of a clerk in the London Jewry : *Select Pleas*, p. 81.
[14] *Cal.Plea Rolls*, I, p. 71. It seems that there was a distinction between the clerks writers to the Arca and the Clerk of the Escheats : cf. Roth, *op. cit.*, p. 110.
[15] *Select Pleas*, p. 81.
[16] Cf., for example, *Cal.Plea Rolls*, I, p. 308.
[17] Cf. Roth, *op. cit.*, p. 273 : for the text of the Articles, cf. *Select Pleas*, p. lv.
[18] *Cal.Plea Rolls*, I, 77 : by tally here is probably meant the counterpart of a chyrograph.
[19] *Cal.Plea Rolls*, I, 84.
[20] *Ibid.*, I, 106.

a transaction was of full age or not.[21] In 1267 John de Laufare, London chyrographer, is called to witness to an argument entered into before him.[22] In 1268 William de Burle claims that he made part payment of a debt owed to Isaac of Warwick to the chyrographers of Warwick,[23] and Henry Morin alleges that he settled a debt he owed to David of Stamford before the chyrographers of that place.[24] Finally, in 1272, Michael Strangelynn suing Abraham son of Antera on an interesting contract for the sale of timber for delivery by instalments, relied for his witnesses on the chyrographers of Cambridge, two of whom were appointed, with the Mayor of Cambridge and a Jew, to act as arbitrators in the dispute.[25] These examples, taken from a few of the surviving rolls, show the chyrographers' activity at all stages of a transaction. Normally, however, they seem to have taken a more passive part. To take two examples in the same set of rolls, in 1244, Thomas of Newark delivered to Robert le Bret, chyrographer of London, a chyrograph in the names of Richard Fitzsimon and Isaac son of Josce 'to be laid up in the arca', which chyrograph was later delivered by one chyrographer without the knowledge of the others to Richard's son[26]: in the same year, the same Thomas of Newark inquired of the same Robert le Bret in the presence of all the chyrographers of London whether they had received any chyrograph under the names of John de Neville and Jacob Episcopus, Robert replying that he had, that he knew not for certain what it contained, but it might well be it contained £100.[27] No one seems to have thought their ignorance of the transaction remarkable.

A study of the evidence about the activities of the chyrographers' clerks in the drafting and writing of chyrographs leads to much the same conclusion. In 1272 the prior of the new hospital outside Bishopsgate was sued by Abraham son of Josce on a chyrograph made between Abraham and Diaia son of Benedict, part of whose lands the prior was holding: he was discharged of the debt on the grounds that all such documents should be in the hand of a sworn clerk, and ought to be legible to the Christian chyrographer or the clerk, whereas this one was written in Hebrew by

[21] *Ibid.*, I, 127.
[22] *Cal.Plea Rolls*, I, 146: in 1270 he held money to be paid to Isaac of Bedford *ibid.*, 220; cf. also *ibid.*, III, p. 322.
[23] *Ibid.*, I, 188.
[24] *Ibid.*, I, 168.
[25] *Ibid.*, I, 300.
[26] *Ibid.*, p. 92: the chyrographers were fined a total of fifty marks for losing the chyrograph.
[27] *Ibid.*, p. 93: it is interesting to note that Roger de Newark was acting as attorney against Jews in actions for detention of gages in 1276. *Cal.Plea Rolls*, III, pp. 150, 151.

the Jew's own clerk.[28] Earlier, however, the Prior of Dunstable had succeeded in repudiating a debt, arguing that the charter concerned was in bad Latin, and not in the hand of the canon who for the past forty years had written all the charters of the house.[29] It is clear therefore that whatever the situation was, it was not every charter which was drafted by the chyrographers' clerks. There are in the Articles concerning the Jewry, two provisions which throw some doubtful light upon the question. By the first, all loans between Christians and Jews were to be made by writing between the contracting parties by the hand of a clerk specially assigned and sworn for the purpose. By the second, no Jew should lend to Christians on any gage more than the sum of twenty shillings except in the presence of a chyrographer and a clerk specially assigned and sworn for the purpose, so that the gages and loan might be plainly and openly enrolled by the clerk in the view of the chyrographer and with his attestation.[30] The effect of these provisions is doubtful as we have seen, but it would appear clear from their context that many transactions both of gage and of contract had been carried out without the knowledge of the chyrographers.

Regulations were in existence, as we have seen, concerning the form which the chyrograph must take. Originally it was to be in two parts, of which the sealed part was to be in the possession of the Jewish creditor, and the counterpart was to be deposited in the arca.[31] A change in method seems to have taken place before the middle of the thirteenth century. The crucial time seems to have been about 1240. A writ to the chyrographers of Colchester of that year directs them to see that all obligations are executed in triplicate: one part is to be given to the Christian debtor; a second part is to be given to the Jew and the third part with the debtor's seal attached is to be placed in the arca.[32] Whether this writ was part of a general instruction or was merely applicable to Colchester is not clear. It is however significant that in the list of the debts due to David of Oxford in 1244 there are four sealed chyrographs mentioned, the sealed portions of two of which had been deposited in the arcae of Winchester and Oxford respectively whereas in the London and Winchester arcae were the unsealed portions of the other two.[33] Shortly afterwards we find a widow reporting that she has lost 'the middle part' of a chyrograph[34] and although as

[28] *Select Pleas*, pp. 65–8 : cf. also *Cal.Plea Rolls*, I, pp. 71, 75, 150, and II, p. 193.
[29] *Select Pleas*, p. 4.
[30] *Select Pleas*, pp. lviii–lix.
[31] *Cal.Plea Rolls*, I, p. 17.
[32] Gross, *op. cit.*, p. 18.
[33] *Cal.Plea Rolls*, I, p. 77.
[34] *Ibid.*, I, p. 311.

late as 1282 there are numerous references to pleas which allege 'altera pars' to be in a particular arca,[35] it seems that the practice of preparing a document in triplicate was widespread. By the Articles concerning the Jewry it was provided that the practice should be universally adopted in the case of contracts of loan between Christians and Jews for sums in excess of twenty shillings.

What then was the effect of failing to deposit a copy of the chyrograph in the arca? It was twofold. In the first place, the Jewish creditor lost any right to proceed against the debtor by any means, and he could be compelled to give up whatever pledges he was holding to secure the debt, or goods he had taken by way of distraint.[36] This did not mean, however, that the debtor was thereby freed from the debt. The purpose of the organisation of arcae was protection of royal rights in Jewish debts; pressure was brought to bear on the Jew to disclose debts owed to him, and little would be gained by the Crown if, on the failure of the Jew to disclose his debts, the Christian creditor was thereby relieved from liability. We therefore find that though the Jew cannot recover his debt, the creditor is instructed to hold it to the use of the Crown in a number of cases. In 1244, in an action of account between Richard de Peteresfeld and Elias son of Chera, Elias declares that Richard owes him certain sums on certain chyrographs and tallies which he cannot produce. Later he produces a tally for a certain amount but not for the full sum. The record proceeds: 'As there is naught else relating thereto in the arca, order that the King have the debt . . .'[37] Again in 1253 William Bardulf is involved with the same Elias son of Chera who is suing him in debt on certain chyrographs which are not in any arca; the result is that the chyrographs are taken into the King's hands and William is told to answer the King concerning them.[38] A more difficult question arises when the King sues the Christian debtor on his debt. Can the Christian debtor set up against the Crown's claim the defences which would have been available against the Jewish creditor if he had been able to sue on the debt? In 1266 the King sued Osbert, Prior of Royston, for a debt of £7 12s. owing to Saulut Mutun, and contained in a charter found outside the Cambridge arca. The Prior claims that he paid 24s. 8d. to Saulut by the hands of the cellarer and another canon, and offers proof of such payment. The justices adjourn the case, being uncertain whether they may admit such proof in regard to a charter which was found whole, *i.e.*, not

[35] *E.g.*, *Select Pleas*, pp. 117–8.
[36] *Select Pleas*, pp. 8–10.
[37] *Cal.Plea Rolls*, I, p. 84.
[38] *Select Pleas*, p. 14.

in chyrograph.[39] Unfortunately we have no record of what the final decision was. The same point had arisen in both the cases of Richard de Peteresfeld and William Bardulf quoted above. In Peteresfeld's case the justices seem to have admitted that he could defend himself against the Crown by showing that the debt was null. Peteresfeld then claimed that the charter in question had been withdrawn from the arca in 24 Henry III and made quit by a fine between himself and Elias for £10. He was allowed an inquest to find the facts but no further proceedings are recorded. William Bardulf raised the point that his agreements with the Jew were mere pledges of faith and did not contain anything in the nature of a gage. Since the Jew could not enforce the pledge of faith, was William bound to answer to any one? The justices told him to answer to the King if he be bound to answer. Once more, save for the appointment of an attorney by Bardulf, there is silence as to the ultimate result. No answer can be given, therefore, but it may be suspected that, since the justices refused to answer, the debtors were compelled to make a bargain with the King.

But a second result flowed from a failure to place a chyrograph in the arca. The Jew not only lost his rights in the chyrograph but committed a misdemeanour which rendered him liable to punishment by the Crown. The great Aaron of York made a fine with the King in 1250 for this offence[40] and there are many other examples in the Plea Rolls of similar sanctions being enforced.[41] It will be remembered that in the original provisions of 1194 a double check was provided on the working of the system. The justices in Eyre were required to inquire into all possessions of the Jews, an instruction which seems to have continued to be issued to each Commission until the expulsion in 1290, and resulted in the Great Exchequer receiving information from time to time of the particular state of every Jew. At the same time the chyrographers and the Exchequer officials associated with them were to maintain rolls of all transactions carried out before them.

The first method of checking, by means of a periodic examination of the arcae, came to be known as a scrutiny, a device which was effective and usually ominous, since it was normally followed by further demands by the Crown from the Jews. They were comparatively frequent. The scrutiny of 1277 was followed by another in 1279, and a third in 1284.[42] They might be general scrutinies,

[39] *Cal.Plea Rolls*, I, p. 138.
[40] Close Rolls, 1250, p. 382.
[41] *Select Pleas*, p. 67, shows that to make a chyrograph in a form contrary to the Statute of Jewry might lead to the same result.
[42] M. Adler, *Jews of Mediæval England*, p. 94.

or scrutinies of a particular arca. In 1273, for example, Robert de Ludham was ordered to scrutinise and enroll the debts in certain particular arcae, including Cambridge.[43] We are fortunate in possessing copies of some of the scrutinies thus made. Jenkinson has published a list of scrutinies surviving,[44] while Stokes has reprinted two scrutinies taken of the Cambridge arca,[45] and further lists of debts apparently derived from such scrutinies appear from time to time in the Plea Rolls, inserted amongst the ordinary entries of pleas and enrolments.[46] A scrutiny was a very important event for all creditors. When once a scrutiny had been held, the rolls resulting were treated as a final statement of the enforceable debts in the arca concerned,[47] and any debt, which had been created before the scrutiny but was not deposited in the arca until afterwards, was unenforceable by the Jew. It is not surprising, therefore, to find that in 1267 the Jewry of England offered 500 marks voluntarily on condition that they were not tallaged nor a scrutiny made of their chattels for a whole year.[48] There is some evidence however to support the view that not every debt which appeared in the arca was abstracted for the scrutiny. It is a notable feature of those scrutinies which have been printed, that there is no clear case of a debt owed by a Jew to a Jew being abstracted. Abraham son of Josce put this point in 1272 when he was required to explain why a debt due to him was not enrolled in the scrutiny rolls. He pointed out that the debt was one between Jew and Jew and said: 'Starrs of debt of this kind ought not nor have been wont to be enrolled, inasmuch as the King makes the scrutiny that he may know the debts of the Christians, and not that he may know debts between Jew and Jew'.[49]

As for the rolls maintained by the chyrographers, the evidence for them is more tenuous. That they maintained some private records of their own would seem clear from an entry on the Plea Rolls in 1276 where they use records which they have *in officio suo* to clear themselves from a charge of the detention of a charter.[50] It may well be that a list of debts for the years 9–11 Henry III, known as the Norwich Day Book, is such a record.[51] Other evidence is lacking. There are in the Plea Rolls many references to rolls, but they are in the main clearly referable

[43] H. P. Stokes, *Jews in England*, p. 185.
[44] Transactions, *Jewish Historical Society of England*, VIII, p. 19.
[45] *Op. cit.*, pp. 252–79.
[46] *Cal.Plea Rolls*, III, 230–38.
[47] Cf. *Select Pleas*, pp. 9, 10, 14.
[48] Adler, *op. cit.*, p. 217.
[49] *Select Pleas*, p. 66.
[50] *Cal.Plea Rolls*, III, p. 196.
[51] *Transactions of Jewish Historical Society*, V, p. 248.

to the scrutiny rolls. Normally, when a dispute arises as to whether or not a chyrograph is in the chest, a search of the chest is ordered: I have failed to find a reference in this connection to the chyrographers' rolls.

Such then were the Jewish arcae. An interesting experiment in the control of business affairs, they were closed finally and concentrated in Westminster in 1290, on the expulsion of the Jews.[52]

[52] On the expulsion of the Jews and the property found in their possession, see Abrahams, *Transactions of the Jewish Historical Society of England*, II. pp. 76–105.

NOTES ON RECENT CASES

CONFLICT OF LAWS—BAILMENT—PROPER LAW ILLEGALITY—DETINUE—IMMEDIATE RIGHT TO POSSESS

(a) *Zinovstenska Banka National Corporation* v. *Frankman* [1950] A.C. 57.

(b) *Kahler* v. *Midland Bank* [1950] A.C. 24.

(a) The House of Lords has overruled the decision of the Court of Appeal, noted *ante*, p. 262. The appellant bank by a contract made in Prague incorporating its Conditions of Business, became bailee for Frankman of securities lodged with its London branch. Frankman demanded the securities from the London branch which pleaded that such transfer was forbidden by Czechoslovakian exchange law. The House of Lords held that Czechoslovakian law governed, being both the *lex loci contractus* and the *lex solutionis*. The condition whereby securities lodged abroad were 'subject to the legal measures of the respective country' did not constitute English law the governing law, but merely exempted the bank from liability for foreign confiscations. The decision, it would seem, turns upon construction of the contract and involves no new principle relating to the proper law of contract.

(b) In *Kahler's Case* the respondent bank held securities as bailee for the Bohemian Bank which became bailee for the appellant when under German duress he transferred his custom from the Zinovstenska Bank. The appellant, as beneficial owner, now demanded the securities from the respondent bank, claiming in contract and in detinue. The House of Lords unanimously upheld the decision of the Court of Appeal (*ante*, p. 263) dismissing the action in contract, and by a majority, the action in detinue. The action in detinue failed because the appellant could prove no immediate right of possession against the Bohemian Bank and not, as was stated by the Court of Appeal, because the respondent bank could not act without the consent of the Bohemian Bank.

To assist his claim in contract the appellant acknowledged a contract with the Bohemian Bank : the effect in detinue was to force their lordships to construe a contract although the facts indicated no true consensus. The majority held the pleaded contract to be substantially that originally existing between the appellant and the Zinovstenska Bank and so governed by Czechoslovakian law. The

minority construed the contract to entitle the appellant to performance in England governed by English law. This attractive solution, however, implies that the Bohemian Bank contracted to do an act forbidden even in 1939 by Czechoslovakian law. But had the appellant not admitted the contract, could the respondent bank have resisted the claim in detinue?

K. F. G.

CONFLICT OF LAWS—MARRIAGE—NULLITY—VOIDABLE MARRIAGE—JURISDICTION

Casey v. *Casey* [1949] P. 420 (C.A.).

In 1943 the petitioner, of English domicile, married in England a Canadian soldier whose domicile was and remained Canadian. He wilfully refused to consummate the marriage, and in 1946 his wife followed him to Canada, but on his further refusal she returned to England where she petitioned for a decree of nullity.

The Court of Appeal unanimously disowned jurisdiction. Bucknill L.J., with whom Cohen L.J. concurred, followed an earlier decision of the court in *De Reneville* v. *De Reneville* [1948] P. 100, noted *ante*, p. 263 (the place of marriage, he said, being irrelevant), and held the marriage to be voidable, Canadian law being assumed to be the same on voidability as English law. As the husband was on active service no inference could be drawn that the parties intended to make England their permanent matrimonial domicile because they married here. Consequently the wife acquired a Canadian domicile and, since the husband was both resident and domiciled in Canada, her sole residence here was insufficient to found jurisdiction. His Lordship was much swayed by the wife's neglect to institute proceedings whilst in Canada; by her election instead to return to England 'the scales of hardship tip in favour of the husband'.

Somervell L.J. differed from the opinion expressed by Bucknill L.J. that, for the purposes of jurisdiction, suits for nullity of voidable marriages and those for dissolution were essentially similar, and that the sole court should be that of the domicile. In his view the court in *De Reneville's Case* (*supra*) had not accepted the notional identification, for otherwise cases where jurisdiction had been founded upon the residence, without domicile, of both parties (*e.g.*, *Hutter* v. *Hutter* [1944] P. 95; cf. *Inverclyde* v. *Inverclyde* [1931] P. 29) 'were plainly wrong'. The point had been expressly left open in *De Reneville's Case* (*supra*, pp. 117–118, *per* Lord

Greene M.R.). His lordship, however, arrived at the same conclusion as the majority on the view that jurisdiction of the *locus celebrationis* was confined to cases such as *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67 (which should be so confined) where the validity of the ceremony alone was attacked. This petition did not do that.

The problem set by *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641, namely, whether domiciliary courts alone have jurisdiction in nullity suits or whether there are other concurrent cases, thus remains unsettled. *De Reneville's Case* (*supra*) is little advanced. In both *De Reneville's Case* (*supra*) and *Casey* v. *Casey* (*supra*) opinion was confined to voidable marriage. If the *Inverclyde* doctrine prevails, void, *e.g.*, bigamous, marriages fall outside it, and may well be justiciable on the basis of residence.

D. E. C. Y.

CONSTITUTIONAL LAW—PENSION—ESTOPPEL—EXECUTIVE NECESSITY—ASSUMPTION OF AUTHORITY

Robertson v. *Minister of Pensions* [1949] 1 K.B. 227.

The plaintiff, Colonel Robertson, was injured in 1939 on military service, and in 1940 was found unfit for general service by a medical board. In 1941, in reply to an inquiry by the Colonel, the War Office, without consulting the Minister of Pensions who was the appropriate authority, stated that his disability had been accepted as attributable to war service. Relying on this assurance, the plaintiff took no steps to obtain a medical opinion. The Minister of Pensions later sought to repudiate the statement.

Denning J. had no difficulty in holding that such an assurance as that contained in the War Office letter would be binding upon the person giving it, if a subject. Would it bind the Crown also? For the first time *Rederiaktiebolaget Amphitrite* v. *The King* [1921] 3 K.B. 500 was called in aid. There Rowlatt J. had stated that 'it is not competent for the Government to fetter its future executive action. . . . It cannot by contract hamper its freedom of action in matters which concern the welfare of the State'. This would seem to be a rule of law limiting the Crown's ability to give a binding promise. Denning J. was, however, undeterred. The defence of executive necessity 'only avails the Crown where there is an implied term to that effect or that is the true meaning of the contract'. He thus treated the *Amphitrite Case* as the Privy Council treated *Dunn* v. *The Queen* [1896] 1 Q.B. 116 in *Reilly* v. *The King* [1934] A.C. 176.

As the assurance had been given by the War Office which was not the appropriate department, did it bind the Minister of Pensions? In answer to this question, Denning J. formulated a rule of great importance. 'In my opinion, if a government department in its dealings with a subject, takes upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes.' The Crown was therefore bound by the action of the War Office, as was its agent, the Minister of Pensions. This principle has been restated and apparently extended by the learned judge in the Court of Appeal in *Falmouth Boat Construction, Ltd.* v. *Howell* [1950] 1 All E.R. 538. It will now protect the subject not only against the Crown, but also in his relations with third parties.

Whether or not the decision clarifies rather than changes the law with regard to the *Amphitrite Case*, the principle as to assumption of authority will be welcomed by the harassed citizen trying to cope with the flood of regulations, though unfortunately it may result in a greater rigidity and caution on the part of departments.

M. J. P.

CONTRACT—CONSIDERATION—ANTECEDENT DEBT OR LIABILITY—BILLS OF EXCHANGE ACT, 1882, S. 27 (1)

Oliver v. *Davis and Another* [1949] 2 K.B. 727 (C.A.).

Davis became engaged to Miss Ethel Woodcock, although he was already married, and he induced her to give him her savings of £650. He also borrowed £350 from the plaintiff to whom he gave in return a post-dated cheque for £400. He told his fiancée and her sister that he was in difficulty in meeting this obligation and the sister, Miss Marjorie Woodcock, who was the second defendant and appellant, gave him a cheque for £400 in favour of the plaintiff. This he gave to the plaintiff's wife, as the plaintiff was away at the time. Three days later the plaintiff returned, and on the same day, but after he had received the cheque, Miss Marjorie told him that she had stopped the cheque, having discovered Davis' true character. The question was whether there was consideration for this cheque.

The plaintiff relied on section 27 (1) of the Bills of Exchange Act, alleging that Davis' antecedent debt was sufficient consideration. The court held that paragraph (*b*) of the subsection referred only to an antecedent debt or liability of the drawer of the bill (see *Crears* v. *Hunter* (1887) 19 Q.B.D. 341) or at least (*per* Evershed M.R.) that there must be some relationship between the antecedent

debt and the receipt of the bill. Was there then consideration? The plaintiff had neither promised to refrain from taking proceedings against Davis nor did he actually refrain. There was therefore no consideration and the plaintiff's action failed.

It is hard to see, as Evershed M.R. pointed out, what relationship could exist that did not amount to ordinary consideration, and it is noteworthy that the court looked for consideration on traditional lines. There must either be a promise to forbear or actual forbearance. It appears that had the plaintiff actually forborne this would have been sufficient even without a promise (see *Alliance Bank* v. *Broom* (1864) 2 Drew. & Sm. 289, and contrast *Bob Guiness* v. *Salomonsen* [1948] 2 K.B. 42). Denning L.J. reiterated his proposition that a promise intended to be binding, intended to be acted upon, and in fact acted on is enforceable, but he agreed that there was here no consideration as the plaintiff had in no way changed his position in consequence of the promise.

J. A. J.

CONTRACT—GAMING DEBT—FRESH PROMISE TO PAY UNENFORCEABLE

Hill v. *William Hill (Park Lane), Ltd.* [1949] A.C. 530.

The appellant owed a betting debt to the respondent bookmakers and was unable to pay. In the ensuing correspondence, respondents promised not to have him posted as a defaulter in return for his promise to pay part by cheque and the rest by instalments. He paid a small amount but the payments then ceased and the respondents brought their action to recover the balance.

Hallett J., upheld by the Court of Appeal, considered himself bound by the decision in *Hyams* v. *Stuart King* [1908] 2 K.B. 696, and gave judgment for the plaintiffs (respondents). The House of Lords (Viscount Simon, Lord Greene, Lord Normand and Lord MacDermott; Viscount Jowitt, Lord Oaksey and Lord Radcliffe dissenting) in a considered judgment allowed the appeal overruling *Hyams* v. *Stuart King*.

It will be remembered that in *Bob Guiness* v. *Salomonsen* [1948] 2 K.B. 42, Denning J., as he then was, distinguished that case from *Hyams' Case* holding that mere forbearance without an express promise was no consideration, and later in *William Hill (Park Lane), Ltd.* v. *Rose* [1948] 2 All E.R. 1107 attacked *Hyams' Case* again on the ground of consideration. It should be noticed, however, that the decision in this case depended solely on the construction of the second branch of section 18 of the Gaming Act,

1845, the majority holding that it was neither procedural nor was it tautologous with the first branch, but an extension of it covering just such a case as this.

Indeed, with the exception of Lord MacDermott who did not consider the question, their Lordships were unanimous in conceding that, apart from the second branch of section 18, there was a perfectly binding contract for good consideration between the parties. Lord Greene pointed out that 'from the point of view of contract law apart from the Act' the consideration would be sufficient; but the question was not to be answered by finding a new consideration moving from the winner of the wager. If the promise is caught by the Act 'it matters not how new or how valuable the consideration may be'.

This does not mean that a new promise by the loser supported by good consideration will never be enforced. It must be a question of fact in each case whether or not the real nature of the promise is to pay the bet. If it is, then it will be caught by the section and so be unenforceable.

A. D. M.

CONTRACT—LANDLORD AND TENANT—LEGAL USER—INNOCENT MISREPRESENTATION—UNILATERAL MISTAKE

Edler v. *Auerbach* [1949] 2 All E.R. 692.

A LESSEE covenanted with his lessor to use as offices rooms which to the lessor's knowledge might only (by the Defence Regulations, 1939), be used for residential purposes, except with the consent of the local authority. After the lessee had paid the first quarter's rent the local authority heard of the arrangement. The lessor's previous knowledge of his statutory obligation only emerged at the hearing, by which time the lessee had pleaded, inter alia, that the agreement was voidable for *innocent* misrepresentation, and that it had been entered into under a mutual (later amended to unilateral) mistake of fact; he claimed recovery of rent paid. The lessor counterclaimed for balance of rent due.

Devlin J., while holding the lease unenforceable on the grounds of public policy—the lessor having clearly intended the lessee to break the law—nevertheless would not allow the agreement to be rescinded: the lessee had only pleaded innocent, and not fraudulent misrepresentation, and this was not a valid ground for the rescission of an executed lease (*Angel* v. *Jay* [1911] 1 K.B. 666; see, however, Denning L.J.'s criticisms of this case in *Solle* v. *Butcher* [1949]

2 All E.R. 1107 at p. 1121). He found that since the plaintiff alone had been ignorant of the effect of the Regulations, he could not recover on the grounds of mutual (*i.e.*, what the textbooks sometimes name ' common ') mistake : ' I think that the plaintiff made this mistake, but I do not think that he paid the money because of it : the effect of the mistake was exhausted when the lease was made, and the plaintiff made the payment because the lease compelled him to. The lease could be rescinded only if the mistake was mutual '.

The effect was that the Regulation could not be considered ' as an essential and integral element in the subject-matter of the bargain ' (Lord Thankerton in *Bell* v. *Lever Bros.* [1932] A.C. 161 at p. 236) so as to constitute *error in substantia*; had the parties both been ignorant, and had the mistake thereby referred to the lease itself, the plaintiff might have succeeded, and here the case may be distinguished from *Solle* v. *Butcher* (*supra*). (See Bucknill L.J. at p. 1116 : ' There was a mutual mistake of fact on a matter of fundamental importance, and . . . the principle laid down in *Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149 applies.')

R. L. McE.

CONTRACT—MISTAKE OF LAW OR FACT—REMEDY FOR EXECUTED CONTRACT

Solle v. *Butcher* [1949] 1 All E.R. 1107 (C.A.).

S., NEGOTIATING for a flat, gave B. his honest opinion that no standard rent applied under the Increase of Rent and Mortgage Interest (Restrictions) Acts. Hence B. did not claim the statutory rent increase possible for expenditure on improvements. S. took a lease of the flat at a fair rent fixed by agreement and then later claimed the standard rent applied. The Court of Appeal unanimously upheld his claim. B. counterclaimed successfully (Jenkins L.J. dissenting) for rescission of the lease, which was granted upon terms.

The majority held both had acted under a mistake of fact—they believed reconstruction had changed the identity of the flat making a standard rent inapplicable. Jenkins L.J. disagreed—in his view both knew all the relevant facts but misapplied a public statute—the identity test was a step in applying the law and their mistake was one of law.

Bucknill L.J. held the principle of *Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149 applied to the mistake made by the parties.

Denning L.J. said a contract was only void at common law where mistake prevented its formation—otherwise injustice was done to third parties. *Bell* v. *Lever Bros., Ltd.* [1932] A.C. 161 showed a category of *error in substantia* did not exist. Where goods have perished or belong to the buyer at the time of sale an implied condition, not mistake, renders the contract void. Pothier's test is no part of English law and *Sowler* v. *Potter* [1940] 1 K.B. 271 cannot stand with *King's Norton Metal Co., Ltd.* v. *Edridge, Merrett & Co., Ltd.* (1897) 14 T.L.R. 98. Here the contract was not void but voidable in equity as the parties acted under a common fundamental misapprehension as to the facts and B. was not at fault. The equitable remedy for innocent misrepresentation was analogous. The same remedy of rescission applied where X, knowing Y is mistaken about terms of an offer or X's identity, concludes a contract with Y. Doubtless this doctrine that Equity holds a contract voidable for mistake on the analogy of the remedy for innocent misrepresentation will occasion some surprise. However, Denning L.J. said that *Cooper* v. *Phibbs* affirmed the doctrine as applicable to mistaken rights and showed the remedy exists for an executed contract. The contrary opinion in *Angel* v. *Jay* [1911] 1 K.B. 666 (rescission of an executed lease refused for a purely innocent misrepresentation) was wrong. (Cf. Scrutton L.J.'s doubts in *Lever Bros., Ltd.* v. *Bell* [1931] 1 K.B. 588.)

Jenkins L.J. accepted the principle in *Angel* v. *Jay* as valid: in any case there was no misrepresentation as S.'s opinion on the law was not fraudulent. B. had no remedy for a mistake of law—otherwise the object of the Acts would be frustrated.

J. B. C.

CONTRACT—SALE OF GOODS—RE-SALE BY UNPAID SELLER—BUYER'S RIGHT TO RECOVER DEPOSIT

Gallagher v. *Shilcock* [1949] 2 K.B. 765.

The plaintiff agreed to buy a boat from the defendant for £665 and paid £200 as a deposit and part payment. The plaintiff was subsequently informed that he must pay the balance by a certain date, and having failed to do so within a reasonable time thereafter the boat was re-sold for £700. The plaintiff claimed specific performance of the contract, damages for its breach and the return of the deposit.

Finnemore J. said that, the property in the boat having passed to the buyer, the seller had two courses of action open to him, (i) to

sue for the price, giving credit for the deposit, or (ii) to re-sell the goods under section 48 (3) Sale of Goods Act, 1893; and that it would be strange if, exercising the latter right he was permitted to retain the full contract price obtained on re-sale and also the deposit. Whether this was so depended on whether a re-sale by a seller had the effect of rescinding the original contract. There is considerable authority at common law stating that in such a case the contract is rescinded (see *Halsbury's Laws of England*, 2nd ed., Vol. 29, p. 186; *Benjamin on Sale*, 7th ed., p. 990). But Finnemore J. held otherwise, stating that if a seller re-sold in virtue of an expressly reserved right to re-sell, section 48 (4) of the Act in terms provides that the original contract is rescinded, whereas there were no such words in section 48 (3) and the only inference was that the contract in that case is not rescinded. Furthermore, the Act in the main only codified the common law and it was stated in *Blackburn on Sale*, 3rd ed., p. 495, that the rights of the seller in such a case 'came nearer to the rights of a pawnee with a power of sale, than to any other common law rights'. The plaintiff was therefore entitled to recover the deposit. Whether in selling as non-owner the seller had to account for the difference between the amount realised on the second sale and the contract price was not raised on the pleadings and remains undecided.

On the claim for damages, the judge decided that the vendor selling lawfully under section 48 (3) was not liable. It is suggested that this, though justifiable on reading the section, is not entirely consistent with common law authorities.

P. S.

CONTRACT—SALE OF LAND—COMPLETION BY INSTALMENTS—FAILURE TO COMPLETE—DAMAGES—RESCISSION

Thorpe v. *Fasey* [1949] Ch. 649.

In 1937, F. agreed to buy 157 acres of land; the land was split into four equal parcels, completion, payment and separate conveyances to be made in October, 1937, 1939, 1940 and 1941 respectively. F. completed for the first parcel, but was unable to complete for the other three. In 1946, in correspondence, T. pressed for completion, but F. delayed, saying he was waiting for a decision of the Ministry of Town Planning; F. never intimated that he intended to abandon the contract. T. issued a writ claiming (i) damages for breach of contract; or (ii) rescission.

As to (i), Wynn-Parry J. held that T.'s claim for damages failed,

for the only breach that would support such a claim was a breach amounting to a repudiation of the contract. For repudiation, it was necessary to show that an essential term of the contract had been broken; stipulations as to time had never been regarded, either by equity, or, since the Law of Property Act, 1925, s. 41, at law, as of the essence of a contract, unless the parties stated otherwise. Also for this purpose, there was no difference between an anticipatory and any other breach of contract.

As to (ii), Wynn-Parry J. held that rescission could not be granted, for the contract was to be construed as a single contract, not as four; as it had been partly performed, complete rescission was impossible. Rescission could not be granted for the part of the contract that remained; if a contract could not be rescinded 'in toto', it could not be rescinded at all.

'It is not, of course, every breach of a contract that will give rise to damages' (p. 657)—this is a startling proposition to the student; a common law action for damages, it is submitted, will lie for breach of a non-essential term (warranty) of the contract, even if nominal damages only are recovered. This point was taken just previously, in *Phillips* v. *Lamdin* [1949] 2 K.B. 33, where damages for delay in completion were recoverable, for breach of a non-essential term, since damage was proved. Perhaps Wynn-Parry J. meant that the particular damages asked for in this case, if they were for loss incurred by re-sale, could not be recovered, since the contract was still in existence; that may be true, but his proposition seems to confuse common law and equitable principles.

R. H. L.

CRIMINAL LAW—RECEIVING STOLEN GOODS—INNOCENT RECEIPT—SUBSEQUENT INTENT TO APPROPRIATE—LARCENY

R. v. *Matthews* [1950] 1 All E.R. 137 (C.C.A.).

THE appellant admitted receiving property which he knew to be stolen. But at the time of receipt he intended to hand it over to the police. Subsequently he tried to dispose of the property. He was convicted at quarter sessions of receiving stolen property. The chairman directed the jury:

'He received property which was stolen, which he knew to be stolen, and having no guilty intent originally, nevertheless he changed that intent and kept [the property] and my instructions are that in those circumstances that is no defence to these charges,

because the guilty intent is present when he did not hand it over to the police'.

The Court of Criminal Appeal quashed the conviction for misdirection.

Lord Goddard C.J., giving the judgment of the court, stated that if a person receives stolen property intending to hand it over to the police the receipt is innocent, and where the receipt is innocent a subsequent intent to appropriate will not turn it into a felony. The cases of *R.* v. *Riley* (1853) 1 Dears.C.C. 149 and *Ruse* v. *Read* [1949] 1 K.B. 317 do not affect this position. They are concerned with larceny, and there the rule is laid down that if the original taking is wrongful, in that it is a trespass, though it is not felonious a subsequent intention to appropriate amounts to larceny. This does not apply where the property has been taken innocently to return it to the true owner or the police, and subsequently appropriated, for in such circumstances there would be no trespass.

This case shows that the same principle applies to receiving as to larceny, that is that where the original taking or receiving is innocent, a subsequent fraudulent intent will not be sufficient to constitute the offence of larceny or receiving.

The Court of Criminal Appeal has also in this case approved the decision in *Ruse* v. *Read*, where, in larceny, an original taking is trespassory.

V. M. F.

DEED—COVENANT TO SETTLE PROPERTY—CLAIM FOR DAMAGES FOR BREACH OF COVENANT—RIGHT OF VOLUNTEER TO SUE—VOLUNTEER A COVENANTEE

Cannon v. *Hartley* [1949] Ch. 213.

A DEED of separation was executed by the defendant, his wife, and the plaintiff, their daughter, whereby the husband and wife covenanted with each other, and the husband covenanted separately with the daughter, that, inter alia, if the defendant should become entitled to any money or property exceeding in value £1,000 he would settle one half of that property upon himself for life, then upon his wife for life, and subject thereto, for the plaintiff absolutely.

The defendant became entitled to a reversionary interest which, it was conceded, was worth more than £1,000. The wife had died, and the defendant having failed to settle this interest, the plaintiff brought an action for damages for breach of covenant.

The court held that the reversionary interest was ' property ' and caught by the clause in question. The defendant then argued that the plaintiff, not having given any consideration for the covenant, was disqualified from suing at common law for damages for breach of covenant.

Romer J. held that the plaintiff was entitled to succeed; ' The plaintiff, although a volunteer, is not only a party to the deed of separation, but is also a direct covenantee under the very covenant on which she is suing. She does not require the assistance of the court to enforce the covenant for she has a legal right herself to enforce it. She is not asking for equitable relief, but for damages at common law for breach of covenant '.

Re Pryce [1917] 1 Ch. 234 and *Re Kay's Settlement* [1939] Ch. 329, were distinguished on the ground that in neither of those cases was the claimant a party to the deed. In each case a trustee sought directions as to whether he should sue the covenantor for damages for the benefit of a volunteer, and the court directed him not to sue.

There appears to be no case in which a trustee has actually brought such an action. In any event, it seems that the trustee could recover no more than nominal damages for to give substantial damages would be to give the volunteer indirect relief which he could not obtain by direct procedure.

J. C. S.

INTERNATIONAL LAW—SOVEREIGN IMMUNITY—DEPARTMENT OF FOREIGN STATE—SEPARATE LEGAL EXISTENCE

Krajina v. *The Tass Agency* [1949] 2 All E.R. 274 (C.A.).

The defendants, the official Soviet newsagency, published an article in a weekly newspaper which the plaintiff alleged to be defamatory of him. A writ, claiming damages for this libel, was issued against the defendants who, after entering a conditional appearance, applied to the court to set aside the writ on the ground that they were a department of the Soviet State and, as such, immune from suit. This contention was upheld by the Court of Appeal, who affirmed the decision of Birkett J. ordering the writ to be set aside.

Before the Court of Appeal, it was argued for the plaintiff that the Tass Agency was an independent legal entity and not merely a department of State, and that the doctrine of sovereign immunity was thus inapplicable, since Tass had a separate juridical existence from that of its sovereign, the U.S.S.R. This submission was

supported by evidence of the particulars filed on behalf of the Tass Agency under the Registration of Business Names Act, 1916. The court held, however, that the status of the Tass Agency must be determined by Russian law, that the particulars under the Registration of Business Names Act, 1916, did not establish that the agency was an independent corporation liable to suit in the English courts and that, no evidence having been produced to show what were the essential requisites of a separate juridical existence under Soviet law, the appeal must therefore fail.

Of particular interest to international lawyers, however, are the statements of Cohen and Tucker L.JJ. that, even had the evidence established that the agency was a separate juridical entity under Russian law, it would not thereby necessarily have been deprived of its immunity. The court was not called upon to decide whether the activity of the Tass Agency was of a private or public law nature, but, in view of the fact that this decision disposes of a possible argument against extension of the doctrine of sovereign immunity, it is to be hoped that the House of Lords will soon have occasion to review the decision of the Court of Appeal in *The Porto Alexandre* [1920] P. 30, which, by rejecting the Continental distinction between acts *jure imperii* and acts *jure gestionis*, has widened so considerably the scope of the doctrine.

I. M. S.

TORT—CATTLE STRAYING—DISTRESS DAMAGE FEASANT—INAPPROPRIATE CLAIM FOR COMPENSATION—DUTY OF OWNER TO ESTIMATE DAMAGE AND TENDER COMPENSATION

Sorrell v. *Paget* [1950] 1 K.B. 252 (C.A.).

The defendant drove into a field of his own the plaintiff's heifer, which was straying on a railway line. Next morning it was found grazing in another field of the defendant, in which was a herd of his T.T. cattle. He impounded the heifer, and claimed £2 for 'salvage' and also money for 'keep' from the plaintiff's servants. They made no tender of compensation, and he refused to return the animal, which later died. A claim for wrongful conversion was dismissed in the county court.

The Court of Appeal, unanimously dismissing an appeal against this decision, held (1) that the defendant had not wrongfully taken possession of the heifer, for he was acting in the interests of public safety and of the plaintiff, and that he had a right of distress damage feasant; (2) the distress remained lawful until a proper

tender was made. The defendant's claims were inappropriate; nevertheless, however excessive the demand of a lawful distrainor in amount or nature, the distrainee is bound to estimate the amount of the damage done, and make a tender of that amount.

In *Gulliver* v. *Cosens* (1845) 1 C.B. 788 the principle was laid down that an exorbitant demand does not relieve the distrainee of this duty; but the Court of Appeal went further and decided that this rule was not disturbed by a claim for an inappropriate class of compensation—no authority for excusing the distrainee had been cited.

Cohen L.J. indicated that *Gulliver's Case* might not be followed in the future, in so far that it decided that money paid in satisfaction of the exorbitant demand of a lawful distrainor could not be recovered as money had and received (see Glanville Williams, *Liability for Animals*, p. 116); but its underlying principle, that a tender must be made, is clearly settled law (*op. cit.* 114).

If the rule may occasionally cause hardship, it has, it is submitted, the clarity desirable in cases of extra-judicial remedy.

A. D. B.

TORT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—'LAST OPPORTUNITY' RULE

Davies v. *Swan Motor Co., Ltd.* [1949] 2 K.B. 291 (C.A.).

D., EMPLOYED by Swansea Corporation, was riding, against their orders, on the offside of a dust lorry when it was struck by the defendants' omnibus, which was trying to overtake. D. received fatal injuries. His widow sued the defendants, who joined, inter alios, the lorry driver as third party.

Cassels J. found the defendants negligent and solely liable.

The Court of Appeal (Bucknill, Evershed and Denning L.JJ.) found all three parties negligent, and ordered the damages to be reduced, because of D.'s contributory negligence, and apportioned between the defendants and the third party.

The grounds on which D. and the third party were found negligent are of some interest; more important, however, is the question raised, how far the so-called 'last opportunity' rule has survived the Law Reform (Contributory Negligence) Act, 1945.

Denning L.J. declared that, to mitigate the harshness of the old contributory negligence rules, the courts had been used to seek, from several causes, the main, effective cause of damage. In so doing they had applied the 'last opportunity' rule (which was the

same as the rule in *Davies* v. *Mann* (1842) 10 M. & W. 546); it had, however, been completely discredited before the 1945 Act. The legal effect of the Act was to abolish the rule that any contributory negligence on the part of the plaintiff absolutely defeated his claim; and its practical effect to enable the courts to examine *all* causes of damage and apportion the damages accordingly.

Bucknill and Evershed L.JJ. felt that nobody here really had a 'last opportunity' of avoiding the accident; so that the need to consider the rule did not arise. Obiter, they agreed with Denning L.J. that it had, in fact, vanished before the Act; but they distinguished the rule in *Davies* v. *Mann*, which should still be applied whenever the plaintiffs' negligence 'had ceased to be an operating factor'.

If we accept at all the suggestion (implicit in the demise of the 'last opportunity' rule) that the chronology of events is no indication of their causative effect, this last distinction does not seem as reasonable as Denning L.J.'s all-embracing question: How far did *each* act of negligence help to cause the damage?

And the unanimous decision that the 'last opportunity' rule is now dead, may be hard to reconcile with recent suggestions on the relationship between occupiers and invitees.

R. E. G. H.

TORT—NEGLIGENCE—DANGEROUS SUBSTANCES—'NOVUS ACTUS INTERVENIENS'—CONTRIBUTORY NEGLIGENCE

Philco Radio, Ltd. v. *J. Spurling, Ltd.* [1949] 2 All E.R. 882 (C.A.).

The defendants negligently misdelivered cases containing dangerously inflammable celluloid scrap to the plaintiff. Despite precautions by the plaintiff's foreman (who recognised the material's dangerous nature, although it was completely devoid of warning notices), the plaintiff's typist approached the scrap before its removal whilst holding a lighted cigarette. An explosion ensued. The precise nature of the typist's act was disputed.

Did the typist's subsequent act relieve the defendants from liability for the damage resulting from the explosion?

The Court of Appeal held it did not; the defendants' duty was not to deliver such materials without warning in circumstances where damage might result from some mischievous or careless acts of persons on the plaintiff's premises; and the defendants failed

to prove that the typist set the scrap alight ' deliberately ', the only sufficient ' novus actus interveniens '.

The judgment of Greer L.J. in *Haynes* v. *Harwood* [1935] 1 K.B. at p. 156 was preferred to the opinion of Lord Sumner in *Weld-Blundell* v. *Stephens* [1920] A.C. at p. 988—namely that where an alleged ' novus actus ' can reasonably be anticipated, the fact of its happening cannot constitute a defence.

In *Philco's Case*, judicial opinions regarding the duty of persons dealing with dangerous substances, and the meaning of ' deliberate ' when applied to the plaintiff's alleged ' novus actus interveniens ', differed.

Tucker L.J. thought that the defendants should anticipate damage from careless, lawful but mistaken, and also mischievous acts done in ignorance of the substance's nature; and therefore only acts intended to produce the results they actually did would constitute sufficiently ' deliberate ' acts.

Singleton and Jenkins L.JJ. agreed that without warnings, careless and mistaken though lawful lighting of the celluloid was reasonably foreseeable, but thought that any intentional intermeddling, irrespective of the plaintiff's precise knowledge, would constitute ' novus actus interveniens '.

It is submitted that the former view is better because in the absence of knowledge, the initial negligence is still an effective cause contributing to the extent of the final damage.

Knowledge of the material's nature reduces the situation produced by the defendants' negligence to a mere occasion; and the deliberate act with knowledge becomes a ' novus actus interveniens '. The court is not agreed whether the original wrong persists, despite an intentional act done without knowledge of the substance's nature.

Students may also like to refer to *Yachuk* v. *Oliver Blais Co., Ltd.* [1949] A.C. 386—a Privy Council case of a like nature.

J. G. F.

TORT—NEGLIGENCE—INVITEES—UNUSUAL DANGERS—OCCUPIER'S DUTY

Horton v. *London Graving Dock Co., Ltd.* [1950] 1 All E.R. 180 (C.A.).

The defendants were contractors reconditioning a trawler and the plaintiff, an employee of sub-contractors, was a welder working

on the ship. In crossing from one staging to another, an angle-iron furnished a narrow foothold. The staging supplied by the defendants was dangerous and the plaintiff complained to them, but nothing was done. The plaintiff slipped on the iron and was injured. Lynskey J. found the contractors' only duty to the plaintiff, their invitee, was to protect him from unusual dangers and this danger was not unusual as the plaintiff knew of it.

Reversing Lynskey J., the Court of Appeal (Tucker, Singleton and Jenkins L.JJ.) held that an unusual danger was one not normally encountered, and the plaintiff's knowledge of it would not necessarily make it any less unusual. The angle-iron was an unusual danger and the defendants' duty was to make the staging safe. They could escape liability only by proving contributory negligence or *volenti non fit injuria.*

The decision turned on the ambiguity of the rule in *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, 288, *per* Willes J. The court agreed that an invitee, using reasonable care himself, is entitled to expect that the occupier will use reasonable care to prevent damage from an unusual danger of which he knows or ought to know, and that what is reasonable care is a question of fact, notice to the plaintiff being one element for consideration.

Questions arise as to when notice will discharge the occupier's duty. In some cases notice might turn an invitee into a trespasser —as where a customer ignores a shopkeeper's warning not to go to some part of a shop. In other cases notice might make the plaintiff's injury result from his own contributory negligence and, if the 'last opportunity' rule is gone (as was suggested in *Davies* v. *Swan Motor Co., Ltd.* [1949] 2 K.B. 291), damages ought to be apportioned. However, the court held that contributory negligence may be a complete defence, so the 'last opportunity' rule may remain where the plaintiff is negligent with full knowledge of the facts. In effect, then, the occupier's duty is to make the structure safe, and he is relieved of responsibility by reason of the invitee's knowledge only if he can prove contributory negligence or *volenti.*

A higher degree of care has also been required of the occupier in *Turner* v. *Arding and Hobbs, Ltd.* [1949] 2 All E.R. 911 (Lord Goddard C.J.) and *Stowell* v. *Railway Executive* [1949] 2 K.B. 519 (Lynskey J.). On the nature of an invitee, Lynskey J. found in *Jennings* v. *Cole* [1949] 2 All E.R. 191, that it is not necessary for the occupier's interest to be pecuniary. The position of a tenant's invitee injured on premises occupied by the landlord is going to the House of Lords : see *Jacobs* v. *L. C. C.* [1949] 1 K.B. 585.

D. E. A.

TORT—NEGLIGENCE—LANDLORD—DANGEROUS THING

Ball v. *L. C. C.* [1949] 2 K.B. 159 (C.A.).

The landlords of a dwelling-house installed gratuitously a new boiler during the tenancy of Mrs. B. Five or seven years later the boiler exploded, probably owing to the absence of a safety valve. The evidence showed that it was usual to fit such a valve but that this was not an invariable rule. Mrs. B. and her daughter, who was severely injured, sued the defendants for negligence.

Stable J. gave judgment for the plaintiffs ([1948] 2 All E.R. 917—see *ante*, p. 275). He found as fact that the boiler was dangerous, that this was or should have been known to the defendants, and that there was no contributory negligence. Purporting to follow Greer L.J. in *Bottomley* v. *Bannister* [1932] 1 K.B. 458 at p. 478, Stable J. held that the defendants owed a duty of care to persons who would in the normal course of life use the boiler.

The Court of Appeal (Tucker, Evershed and Singleton L.JJ.) were unanimous in allowing the appeal against judgment for Miss B.

Tucker L.J. pointed out that the dictum of Greer L.J. (*supra*) must refer to contractual duty as otherwise it would be contrary to *Malone* v. *Laskey* [1907] 2 K.B. 141, which was binding. This latter case, which was not considered in the lower court, was on all fours with the present one. There could only be liability to a stranger for public nuisance, for a noxious thing, or as controller of premises. The boiler was not in the category of noxious things and there was no legal duty to Miss B.

The fact that the boiler formed part of the realty is irrelevant to this decision, and the liability of the landlord is the same as that of an independent contractor.

The judgment is unfortunate since it helps to perpetuate the uncertain category of noxious things. The judges refused to attempt to define the limits of that category and the law remains obscure. If the judgment of Stable J. had been upheld a startling contrast with *Otto* v. *Bolton* [1936] 2 K.B. 46 would have arisen and legislative action might have resulted.

There was no appeal against the judgment for the tenant. Although the installation was gratuitous the defendants were benefiting their reversionary interest and Evershed L.J. thought they were perhaps wise not to appeal.

R. G. W.

TRUST—RESULTING TRUST—MONEY PLACED IN NAMES OF DONOR AND ANOTHER—GIFT NOT TO TAKE EFFECT UNTIL DEATH OF DONOR—WHETHER GIFT TESTAMENTARY—WILLS ACT, 1837.

Young and Another v. *Sealey* [1949] Ch. 278.

A Miss Jarman opened banking accounts in the joint names of herself and the defendant, her nephew. Until her death intestate, she retained control of the pass books, and the defendant had no dealings whatsoever with the accounts. Her administrators here sought a declaration that the defendant was trustee for her estate of the assets to which he had a legal title by virtue of being the sole surviving joint holder.

Romer J. dismissed the action. Despite her retention of control over the accounts during her lifetime, it was clear from the evidence that Miss Jarman intended a beneficial right to pass to her nephew at her death in respect of such assets as should then be standing to the credit of the accounts. This rebutted the presumption of a resulting trust.

The plaintiffs further contended that the gifts were of a testamentary nature, and void for non-compliance with the Wills Act, 1837. In *Owens* v. *Greene* [1932] Ir.R. 225, the Irish courts had accepted such a contention; the courts in Ontario had taken the opposite view in *Re Reid* [1921] 50 Ont.L.R. 595—holding that the gift was perfect ab initio, and subject not to a power of revocation, but to a power to defeat in whole or in part the purpose of the gift.

His Lordship preferred the reasoning in the former case. But a line of English cases—*Beecher* v. *Major* (1865) 2 Dr. & Sm. 431; *Marshall* v. *Crutwell* (1875) 20 Eq. 328; and *Re Harrison* (1920) 90 L.J.Ch. 186—has upheld such gifts without apparently adverting to the difficulty, and, in the circumstances, a change in the current of authority should be made, assuming that it is to be made at all, by the appellate court rather than by a court of first instance.

B. A. R. D.

BOOK REVIEWS

Freedom Under the Law. The Hamlyn Lectures. First Series. By the Right Honourable Sir Alfred Denning, one of the Lords Justices of His Majesty's Court of Appeal in England. [London: Stevens & Sons, Ltd. 1949. viii and 126 pp. 8s. net.]

This little book contains four lectures delivered by the Rt. Hon. Lord Justice Denning in the University of London in October and November, 1949, under the auspices of the Hamlyn Trust, entitled Personal Freedom, Freedom of Mind and Conscience, Justice between Man and the State and the Powers of the Executive. He compares the system of law and procedure prevailing in many European countries with that of our own. Laymen and lawyers should read it, and we heartily commend it to those who find freedom everywhere except in England. It recalls Dicey's contributions on the freedoms and liberties in his *Law of the Constitution*, but shows that despite the inevitable increase in administrative tribunals, there is still much freedom left. Valuable suggestions for reform are made, and a note of warning is given—'Properly exercised the new powers of the executive lead to the welfare state: but abused they lead to the totalitarian state' (p. 126).

T. E. L.

Five Jewish Lawyers of the Common Law. By Professor Arthur L. Goodhart, K.C., Professor of Jurisprudence in the University of Oxford. [New York: Oxford University Press. London: Geoffrey Cumberlege. 1949. 66 and (index) 9 pp. 5s. net.]

Professor Goodhart here makes available to a wider and more permanent audience and in more extended form the Lucien Wolf Memorial Lecture, 1947. The result is a fascinating and delightfully written quintet of biographies of five great American and English lawyers.

And worthy subjects of his pen pictures were these men who so worthily played their part in 'the enobling tradition of the Law': the romantic struggling young lawyer in North Carolina who was successively a leading commercial lawyer, Secretary of State for the

Southern Confederacy, a defeated and hunted soldier adrift in the open seas, at the age of fifty-four a student at Lincoln's Inn, three years later the author of a *Treatise on the Law of Sale of Personal Property* ' which will forever perpetuate his name among English lawyers and ended a life as ' various as an eastern tale ' as the acknowledged and honoured Leader of the English Bar.

Then the consistently successful science graduate and later Fellow of London University who, through his scientific training, achieved a clarity of thought as counsel and on the Bench enabling him to give judgment immediately at the conclusion of counsel's arguments in a case taking twenty-three hearing days, the first Jew to be a Privy Councillor, whose achievements as Master of the Rolls ensured the occupant of that office as a permanent judge of the Court of Appeal.

The Austrian emigré, precocious Harvard law student, a practising partner of Oliver Wendell Holmes, the ' people's lawyer ' in the worst period of American industrial unrest, the first Jew to reach the American Supreme Court; where he was the first to champion the legality of Roosevelt's New Deal.

The young London boy, ' the terror of his schoolmasters, the scandal of the neighbourhood and the despair of his father ' who was to become England's Lord Chief Justice, the ship's boy on the *Blair Athole* bound from Cardiff for India, who, forty-four years later, was next to journey there as its greatest viceroy, who out of his own hard experience so aptly said ' the Bar is never a bed of roses. It is either all bed and no roses, or all roses and no bed '.

Finally, the story of tragedy achieving honour and distinction. The son of a disgraced New York judge learning at his mother's knee a life-long love of English literature, later to become Chief Judge of the Court of Appeals in New York State, delivering opinions which probably had more influence in the law of torts than any other judgment since *Rylands* v. *Fletcher*, anticipating as they did by many years the later decisions of the English courts in *Donoghue* v. *Stevenson* and *Haynes* v. *Harwood*.

These then are the five Jewish lawyers of whom Professor Goodhart here writes. Each is a gem of its kind and behind all one senses the genuine tribute of their great kindred spirit who is the writer.

Professor Goodhart concludes by properly emphasising their common qualities, their fundamental liberalism, their clarity of thought, their interest in scholarship, and, most striking of all, the dominant role which the mother played in the life of four of the five. Young and old alike who inherit ' the enobling tradition of the Law ' must find pleasure and profit in the pages of this all too short book.

T. Mervyn Jones.

The Legislation of Edward I. By T. F. T. Plucknett, Fellow of the British Academy, Professor of Legal History in the University of London. [Oxford: Geoffrey Cumberlege (Clarendon Press). 1949. xv and 161 and (index) 6 pp. 15s. net.]

The enactments of Edward I, says Professor Plucknett, 'have often been praised, and less often read', and his book shows how serious this gently worded reproach is. Even to lawyers and historians, of whom more has been expected than the ability to write a short note on *Quia Emptores* for the satisfaction of a bored examiner, these statutes have commonly appeared as a magnificent mass of technicalities, some of lasting importance, matter for reverent mention, and nearly all of them intrinsically tedious. The tedium has been that of ignorance. Professor Plucknett has put the statutes in their context, or rather conjured up the context around the statutes, has elicited the human situations with which they were concerned and the atmosphere in which they operated, and in so doing has made them real and exciting. 'By understanding their technical machinery we can discover the social, political, and legal problems which they dealt with, and assess their place in the history of the nation.'

His book comprises the substance of the Ford Lectures for 1947, and with so large a possible field of discussion it was necessary to select. 'The topics chosen for study were therefore those which seemed to give an opportunity for combining the traditional interests of lawyers and historians. Throughout, the object has been to interest lawyers in the historical aspects of the law, and to entice historians to enter upon the more strictly legal aspects of those famous statutes which even the most elementary treatment of history cannot fail to mention.'

We are already deeply indebted to the author for our understanding of the nature of statutes in this period and of their relationship with the common law, and the opening chapter is devoted to a statement of his present position in this matter. So important is this, not merely for the business in hand but from the most general viewpoint, that a brief abstract may be permissible. The common law was the custom of the realm, and any legal change was simply the adoption of a new custom. Three principal methods of change may be distinguished: first, the king's court might of its own initiative declare a new custom and so give the common law a new rule; secondly, the judges or other officials might act upon an administrative document, what we should call a directive, addressed to themselves and communicating the government's intentions; and thirdly, there were the statutes. Statutes cannot be distinguished by their form, nor by the way in which they were enacted, and indeed, 'The only safe course is to say, quite simply, that those things are statutes which

contemporaries themselves describe by that word'. They had, however, one characteristic which was to control their future: a statute was a text, a published text, and a concentration on words, on what they actually said, and later on what they did not say, was inevitable; and so in time statutes came to be regarded as 'written law' in the strict sense. 'The statute has ceased to be a mere detail in the custom of the realm, and must henceforward be regarded as something external to it', a new source of law. But in Edward I's time all that lay in the future. Statutes were, in essence, 'merely modifications of the elastic web of the customary common law. The fact that they were in a written, published form was still only an accident. As yet, the interpretation of such documents is merely the process of their reception into the larger fabric, with such modifications of both as might be necessary to achieve a practically satisfactory result. The whole process was conceived, as it were, as taking place inside the closed system of the common law'. The three methods of legal change 'are essentially the same (in so far as the reign of Edward I is concerned) for all these procedures were merely incidents in the life of the custom, going on inside it, part of its natural functions, and in no sense the injection of a foreign substance from outside'. The implications of this conception, some of which the author indicates, are very far-reaching, and the discussion is one which no historian, legal or other, can afford not to read with the closest attention.

The next three chapters are concerned with those statutes which were particularly dominated by the feudal pattern, and Chapter Two, 'The Law and Feudalism', opens with a discussion of which the burden is tersely expressed at a later stage: 'We must take our feudalism as we find it, with all its contradictions and illogicalities. It is a grave error to treat it as a closely knit ideology which contemporaries could attack or defend'. The body of this chapter deals with the relations between the king and the feudatories, and in particular with the motives, the implications, and the fate of Edward's treatment of franchises. The author then turns to the relations between the lords and their tenants, and it is perhaps in Chapter Three that he demonstrates most clearly how much of general importance can be learned from a close study of technical machinery. The relationship of lord and tenant rested largely upon the lord's seisin of his customs and services; performance of these could be enforced by distraint. The relationship was therefore in practice virtually defined by the limits of the right of distress, and this in turn was primarily controlled by the action of replevin. Detailed changes in the operation of this action, culminating in what is now seen to be a revolution in its nature, have been made to tell the story of a serious social problem, and this story could be told in no other terms. Chapter Four, 'The Incidents of Feudalism', is composed of three parts, of which the first relates to aids and wardship, marriage being reserved for the

next chapter, and brings out some curiously modern touches in the regulation of these incidents. The background is happily depicted: 'Aids, like other feudal incidents, had been commercialised until they came to be regarded as merely casual windfalls in the lord's account, occasional bonuses to cheer the investor in seignories'. The second part treats of some avowedly economic details of the relationship between lord and tenant, particularly rights of common and the problem of approvement; and the third and most important part discusses three of the broadest aspects of that relationship, namely, the lord's power to regain the fief by an action of *Cessavit* for persistent default of customs and services, and consequential difficulties in the case of a mesne tenancy; the radical operation of the Statute of Mortmain; and the question of sub-infeudation.

In the last two chapters the author addresses himself to matters which were not governed so exclusively by the feudal pattern. Chapter Five, 'The Family', deals first with the wardship of the person of an infant heir and the right of marriage, and by way of illustrating the sort of thing which might happen recapitulates the hair-raising story of Joan of Bluntesdon, who was married to Warin at eight, deposited with nuns, abducted by William, sold with the wardship of her lands to Ralph, and by him bestowed in marriage upon Richard; eventually she ran away from Richard, became involved with Peter, escaped from him by a stratagem, and finally returned to Warin. 'By then the heroine of this novelette was twelve', and it is to be hoped that she lived happily ever after, with Warin. The chapter passes next to the regulation of the marital estates, and concludes with a most valuable account of the background and effect of *De Donis*. The sixth and last chapter is devoted to commerce, and its keynote is the conflict between the needs of the merchant on the one hand and the feudal pattern of society on the other. The former demanded that all a man's assets should be available for the speedy settlement of his debts; the latter, by its insistence on the inviolability of the freehold, required that the principal form of capital should be kept beyond the reach of creditors. Edward's attempts to resolve this conflict make an absorbing story, and the author draws particular attention to a most interesting point, namely, the substantial difference between the policy of Acton Burnell and that of the Statute of Merchants. That land was the principal form of capital presented a similar problem to non-mercantile creditors, and the statutory solution of this, *elegit*, is also considered. 'This discussion goes to show the inherent obstruction to business transactions arising out of the feudal view of land. Nevertheless, there was a business side to feudalism', and the last special topic to be discussed is the action of account. The chapter closes with an evaluation of the statutes as a whole, an assessment of 'their place in the history of the nation'.

In this notice an attempt has been made to indicate the topics which are dealt with in the book, but its real range can scarcely be suggested in so short a space. The reader will find that light is thrown upon many matters far outside the period and subject specifically under discussion; to mention but one example, in considering the nature of statutes in the first chapter the author throws out a suggestion about the real significance of 'readings' in the Inns which is of great interest in itself and which may have exciting implications. That the book is an important one goes without saying; any publication by Professor Plucknett is an event, and in this study he has, as it were, drawn a comb through the tangle of one of the most crucial periods in the history of English law, and presented the separate strands for our inspection. This was a formidable task, but its accomplishment is only one measure of the achievement of the work. In view of the extraordinarily technical nature of the material it will not, perhaps, be considered an impertinence if particular mention is made of the manner of its presentation. First, addressed as it is to lawyers and historians, and not merely to legal historians, the book assumes the minimum of special knowledge. Secondly, it is written with a humour and lightness of touch which one would have thought hardly possible in such a field, and the reviewer at any rate enjoyed every page of it. And finally, it is distinguished by that sympathy which alone can make history significant: the reader finds himself really understanding the pattern of society and the particular interests of each class in it; he appreciates just what it was that the legislator was trying to do, and how far he succeeded, where he failed, and why. An important chapter of legal history has been presented to us as a fascinating study in human effort.

S. F. C. Milsom.

History and Sources of the Common Law: Tort and Contract. By C. H. S. Fifoot, M.A., of the Middle Temple, Barrister-at-Law, Fellow of Hertford College, Oxford, All Souls Reader in English Law. [London: Stevens & Sons, Ltd. 1949. xvii and 443 and (index) 4 pp. £2 5s. net.]

This book is in form a compromise between, or rather a combination of, a textbook of the English pattern and a case-book in the American style. It is divided into a number of sections, each concerned with the development or some aspect of the development of a particular form of action; and each section is in two parts: first, a narrative; and secondly, a collection of source material culled from Glanvill, Bracton, Bracton's *Note Book*, the *Register of Writs*, the *Year Books*, the reports, and so forth. The author's own account of its genesis must be quoted: 'I had at first intended

to leave the evidence, with as little commentary as possible, to speak for itself. But I came to feel that, in a book designed primarily for students, this course was too austere. I have therefore introduced each subject with a narrative, which may serve to provide a context for the sources and which has enabled me to refer to authorities too numerous to cite in full. In these narratives I have been led from time to time into controversy, and I have not scrupled, when I have formed my own conclusion, to declare it. To confirm or to correct, the reader has only to turn to the sources, and perhaps, as I hope, to explore further on his own account'. In the result, the proportion of narrative to source material is something like three parts to four.

The value of this method of presentation will only appear from experience of the book, but some observations may be offered. The American case-book, which consists wholly of source material, is designed primarily to force the student to construct his own system of knowledge and to reach his own conclusions. That course has always been considered too austere in this country, and, whatever its validity for teaching the principles of modern law, it would be almost impossible for the history of legal doctrine. There are several reasons for this, of which only two need be mentioned: first, it would require an apparatus of formidable complexity to enable the student to understand details of process which he cannot be expected to know; and secondly, the volume of material necessary, especially if divergent views were to be fairly represented, would be beyond all reason. In short, both author and reader would have to know a great deal more than anybody is likely to know in the foreseeable future. The present work, then, cannot serve the main purpose of the American case-book, and it seems certain that the author is right in not trying to make it do so. What purpose, then, will his method of presentation serve? So far as the ordinary student is concerned, the principal answer is this: it will give reality, and with it at least the possibility of a genuine interest, to a subject which only too often appears to him as a mass of assertion and conjecture taken entirely at second hand, learnt by heart, and rarely understood. Many teachers of legal history must have had the disquieting experience of reading essays which discuss in abstract terms the significance of, say, certain *Year Book* cases, only to find that their writers have not the smallest idea what those cases are about. To learn the subject like that is almost a waste of time, and this book, by presenting the student with illustrative selections of source material, in English or with English translations, makes it much easier for him to gain some real understanding of what happened, and may lead him, as the author hopes it will, to seek further. None of the material so presented has in fact been at all inaccessible, except to the student with poor library facilities, but that is hardly the point.

To accept the advice of a footnote and consult a severe-looking volume which may prove to be written in an unfamiliar language is one thing; to turn a few pages of the book you are reading with the assurance that you will find what you want and be able to understand it is quite another, and Mr. Fifoot has made an admirable job of selecting his material.

Mr. Fifoot's views and his choice of materials will, of course, be of importance to those who are students in a more specialised sense, and something must be said of this aspect of the book. Its general approach to controversial matters is one of appraisal of the existing theories. The reader will find relatively little in the way of new answers, but the author's careful discussions will lead him to ask new questions and will draw his attention to suggestive difficulties. The book may perhaps best be described as a summing-up with suggestions, and as such it is of great interest. In so far as it can have such a thing, its central theme is that of the origins and nature of trespass and its relationship with case, and some comment may be made about this. Of trespass Mr. Fifoot says: 'The Christian repeating the Lord's Prayer and the pleader conning the Register of Writs are not likely to attach the same meaning to the word, and even the legal context varies with its period', but unfortunately he leaves us a little uncertain just when, in his view, the Christian and the pleader began seriously to differ. It is suspected that he attributes a technical usage to the latter at a rather earlier period than is necessary. This perhaps colours his approach to the origins of case, so that, while ranging himself with Professor Plucknett and Miss Dix, he apparently yields a point to the traditionalists by saying: 'The stock selected for grafting was Trespass'. This question of the legal content of the word 'trespass' (perhaps to a pleader conning anything but the Register of Writs) is fundamental, and readers may wish that Mr. Fifoot had expressed his opinion a little more clearly.

Apart from this specific point, it is proper to say that the book is written in a style which does not always make for the greatest clarity; in particular the points in an argument are sometimes enumerated and then referred to only as the first point, the second point, and so forth, which, in a long discussion, imposes a considerable strain on the memory. There are, however, many compensations, for example, the effect of the new procedure could not be more happily described than in the following sentence: 'In contract as in tort the judges were left, unprotected by the forms of action, to meditate upon principle'. Again, to speak of 'judicial virtuosity' with a footnote reference to the *High Trees Case* is a touch which will give much simple pleasure.

The reviewer has noticed only one important misprint. On p. 256, in a passage from *Glanvill* about fines, it is said that the writing is delivered 'to both justices'; 'parties' must be meant.

It may be suspected that something has gone wrong with the whole sentence, which, as it stands, is not a very exact rendering of the Latin.

These criticisms relate to matters of detail, and this review must close by repeating the opinion that the book should be of considerable value to students and of considerable interest to specialists in legal history. It will ease and make more interesting the task of the former, and will give the latter much food for thought both in the views which it expresses and in the material which it brings into prominence.

S. F. C. Milsom.

The Law and the Commonwealth. By R. T. E. Latham. [London: Geoffrey Cumberlege (Oxford University Press). 1949. vii and 121 and (list of cases) 2 pp. 7s. 6d. net.]

This review gives the reviewer the opportunity of paying public tribute to a late colleague. Latham was a brilliant personality who scintillated in all personal contacts. He was not only a brilliant lawyer but a brilliant companion in all circumstances. But all this sparkle was a cover for a deep seriousness about fundamental values and this was given practical effect in his decision to throw up a safer opportunity to serve his country for the hazards of air crew which cost him his life. This firm adherence to fundamental values was the essence not only of a penetrating mind but also of great integrity of character. The world is the poorer place for the passing of Latham.

This book, which is a reprint of his contribution to a *Survey of British Commonwealth Affairs* published in 1937, does in some respect exemplify those characteristics of mind and thought. It is an examination of the fundamental legal characteristics that constitute the British Commonwealth. This is inevitably a subject on the borderline of law, jurisprudence and political theory, since it involves 'conventions' and 'fundamental laws' in a constantly changing world. Considering that he was only twenty-seven years of age when he wrote this essay there is a surprising maturity and grasp over a wide range of constitutional theory and practice. The fact that he was first trained in Australia and had the best contacts there was an undoubted advantage, but it is thought that no one wishing to study the essential legal and juristic issues involved in the administration of the Commonwealth can afford to miss this book. Criticism would be first against his belief in 'fundamental conventions' in the Commonwealth, which sprang from his failure to recognise in others the lack of firmness of character and purpose which he had himself, and which, therefore, failed to appreciate the chances and weaknesses of bonds dependent upon the passing whims and fancies of politicians, controlled as those are in the old

Dominions by the steadying influence of the British spirit in common people. It would be interesting to know how he would re-write pp. 582–583 on the subject of the Crown.

Our second doubt would be the claim for a different interpretation of constitutional statutes from those relating to ordinary law. Latham did not approve of the English methods of statutory interpretation and repeatedly says so, but, as we understand him, he would have introduced a much more liberal method into constitutional interpretation. It is true that however approached it is an intensely difficult topic, but in our view the less the judges are swayed by any but purely legal considerations the better, even if this operates to restrict statutory interpretation and occasionally to result in absurdity. It is our belief that the real independence of the judges is dependent upon precise limitation in the political sphere so that they cannot influence policy. It must be borne in mind that interference may be indirect as well as direct, as in making new appointments, and great as our tradition is there is nothing to justify putting upon it unnecessary strains.

But these are minor criticisms of a stimulating and valuable essay on constitutional fundamentals. Our only regret is that the learned author is no longer with us to bring it up to date and add to our stimulation.

H. P.

The Stair Society, Vol. XII. The Justiciary Records of Argyll and the Isles, 1664–1705. Transcribed and edited with an introduction by John Cameron, m.a., ll.b., ph.d. [Edinburgh: J. Skinner & Co., Ltd. xxi and 240 pp.]

This volume contains the records of criminal trials held in the Justiciary Courts of the Sheriffdom of Argyll and the Isles from October 19, 1664, to October 3, 1705, during which period the office of Justice-General of the Sheriffdom was hereditary in the family of the Earl of Argyll. The Justice-General (sometimes called Justiciar) had supreme jurisdiction in the name of the King. He need, however, not preside in person, but could commission a Justice-Depute or Justice-Substitute to act for and be answerable to him.

All the trials proceeded upon indictment and before a jury (Assize) of fifteen. The verdict was given in writing. A useful account of the forms and procedure is to be found in the introduction. The law was rigorously administered according to the statutes and standards of the times. As the learned editor points out, these standards (in Argyll) were not materially different, either in severity or leniency, from those prevailing in the Justiciary Court of Edinburgh of the same period. The bloody barbarities still practised in England many years later are notably absent from these records. There was no burning alive, not even of a witch;

no drawing and quartering; and in the only three cases where mutilation was ordered it was to be done *after* death.

The rigour of the law as to forfeiture of moveables is tempered in three cases, all before the same Justice-Depute (John Campbell of Moy), for the benefit of dependants. In cases 43 and 65 the panel was in each case convicted of theft. In the first the Justice-Depute ordered that the panel's goods be used 'towards the intertainment of his wife and childrein' after paying a surety's claim; and in the second the Procurator-Fiscal was recommended to accept 100 merks [1] in composition. In no. 67 the goods of two men accused of adultery were escheat for their non-compearance, and the Procurator-Fiscal was recommended to consider the cases of their wives.

The introduction adequately fills in the background, and has useful references to other sources. In one or two places it is a little misleading, perhaps. For instance it would not be unreasonable to infer from the penultimate paragraph on p. xviii that the records contain only one challenge on the ground of wilful error, whereas there are two (72 and 77a); and from the penultimate paragraph on p. xxxi that mutilation was ordered in one case only, not three (102, 106 and 107). It is, by the way, noteworthy that the same Justice-Depute (John Campbell) presided in all three cases.

The volume (available only to members of the Stair Society) is well produced. The reviewer has noticed only one textual mistake —on p. xviii l.22 should read after l.23—and one error in the index; but he has not tried to check the latter.

D. I. C. A.-C.

The Code of Maimonides, Book Thirteen, The Book of Civil Laws (Yale Judaica Series, Vol. II). Translated from the Hebrew by J. J. Rabinowitz, Member of the New York Bar. [New Haven: Yale University Press. London: Geoffrey Cumberlege. 1949. xxiv and 345 pp. 27s. 6d. net.]

Maimonides, the greatest Jew of the Middle Ages, lived in the twelfth century, in Moslem Spain, Fez and Egypt. An eminent physician—a manuscript containing a Latin translation of his tractate on asthma may be found in Caius College library—he was chiefly interested in theology; and theology at that time included philosophy, law, ethics, mathematics, science, etc. His two principal works are (1) the Guide for the Perplexed, in Arabic, a philosophical justification of Judaism; and (2) a Code in Hebrew, which he called *Mishneh Torah*, 'Repetition of the Law' (cp. Deuteronomy 17.18), and which in fourteen books embraces the entire Jewish law, religious and secular, public and private. The Guide, in which he attempted to reconcile reason and revelation,

[1] 1 merk = 1/1⅓d.

or Aristotelian-Neoplatonic philosophy and scripture, was soon translated into other languages, above all, Latin, and exercised an enormous influence on men like Thomas Aquinas and Duns Scotus. Very naturally, the Code proved of less interest to non-Jews; some portions remain untranslated to this day.

'Judaica Research' at Yale now plans a translation of all the fourteen books, with a critical appraisal of the Code in a fifteenth volume. The volume here discussed is the first to appear. It is a translation of the thirteenth book, 'Judgments', never translated before. There are five sections: hiring, borrowing and depositing, creditor and debtor, plaintiff and defendant, inheritance.

Mr. Rabinowitz is to be congratulated on his achievement. His rendering is sufficiently literal to reproduce the meaning of the original, and sufficiently free to be intelligible. Of course there are passages as to which one might differ; *e.g.*, as title of the fourth section he puts 'Pleading', though the literal 'Plaintiff and Defendant' would seem good enough. But on the whole he has struck the right middle and provided the legal world with a reliable and readable translation of this most important book.

The author's solution of the old crux in section 3, ch. 11, para. 11 (pp. 120, 307), is hardly satisfactory. Perhaps the full stop after *hattaqqanah* ought to go, and we ought to translate: 'It happens that a creditor, by reason of this term, is able to collect more than he could by reason of the enactment, since the clause constitutes a great safeguard against the possibility that the debtor was ignorant of the enactment'. In section 3, ch. 4, on p. 91, para. 9 has dropped out. In the notes on section 5, ch. 1, on p. 324, the line '3. "Whoever is prior." BB 8:2.' should be transposed so as to come before the comment on 'if there be no sons living'.

It is tempting to speculate how much earlier we might have had this translation had Maimonides accepted Richard Cœur-de-Lion's invitation to practise at the English court.

David Daube.

For the Defence. By Lloyd Paul Stryker. [London and New York: Staples Press. 601 and (index) 23 pp. 21s. net.]

A Liberal Attorney-General. By George W. Keeton, M.A., LL.D., of Gray's Inn, Barrister-at-Law, Professor of English Law and Dean of the Faculty of Law, University College, London. [London: James Nisbet & Co. 237 and (index) 4 pp. 15s. net.]

The first of these is 'A life of Thomas Erskine, the celebrated English advocate, and one of the most enlightened men of his

times '. It is written by an American lawyer for Americans. The second is ' the life of Lord Robson of Jesmond (1852–1918) with an account of the office of Attorney-General '. It is written by an English lawyer, who needs no introduction, for Englishmen. There could hardly be a greater contrast in conception or style.

Mr. Stryker's book is a ready made script for a film of the historical epic type. The synopsis is provided by the author in his Prologue: ' The eighteenth century was stirring fitfully in its long slumber when he (Erskine) was born. It was the age of Samuel Johnson and Sir Joshua Reynolds, of Edmund Burke and Sheridan, of Pitt and Fox. The flintlocks of Concord, of Bunker Hill, and Saratoga lit the skies of Erskine's youth. The ashes and sparks of that far-off conflagration set alight the holocaust of seething Bourbon France. The French Revolution rocked the world when Erskine was in his forties. It gave him the opportunity that made him what he was. Also from this monster's fiery bowels came Bonaparte, the scourge of Europe, . . . '. From the moment when Erskine is apostrophised at the beginning, ' Come down, then, Thomas Erskine, from those pedestals and canvasses. . . . Let us see you panting in the dust and heat of the arena. . . . Burst your marble fetters ! Strip off your cerements of oil and canvas ! ', through the five reels, ' The Drums of Saratoga ', ' A Wind from France ', ' Pitt cries: " Treason ! " ', ' The Corsican ', and ' George, Be a Gentleman ', down to the last shot, ' Home is the Sailor ', the story clamours for Mr. Cecil B. de Mille. The pace is terrific, the atmosphere vibrant and the colours vivid. The fact that a shade of deep purple predominates will worry only a few. A wealth of research has gone into its preparation, there is a comprehensive Bibliography and a detailed Index, but it is as first rate entertainment that it qualifies for praise. It is the eighteenth century in Technicolour.

Professor Keeton, on the other hand, gives us a quiet and scholarly account of a lawyer whose name is, perhaps, too little known today. Viscount Simon, in the Foreword, places William Snowdon Robson among ' the select company of able and useful public servants who were outstanding and influential politicians in their day . . . but in danger of being forgotten after they have gone unless some adequate record of what they did is made public in due time '. Professor Keeton provides a record that is far more than adequate of a man who was Solicitor-General from 1905 to 1908 and Attorney-General from 1908 to 1910 when he retired after a breakdown in health to become a Lord of Appeal in Ordinary until 1912. The book contains, in Chapter VIII, a twenty page paper on the historical development and modern function of the office of Attorney-General. This is of considerable value to everyone reading Legal History. The chapters on the Trades Disputes Act, 1906, the constitutional struggle of 1909–1911 and the North Atlantic Fisheries Arbitration are of interest to all lawyers, Liberal

or not. Robson's remark after the Moral Sciences Tripos, 'If I had read another twenty-four hours, I believe I should have got a first; as it is I shall get a second', is quoted by Professor Keeton in support of the proposition that 'Foresight was indeed a pronounced characteristic of the young Robson'. Perhaps.

F. J. O.

English Contribution to the Philosophy of Law. By Arthur L. Goodhart, K.C., Professor of Jurisprudence in the University of Oxford. [New York: Oxford University Press. London: Geoffrey Cumberlege. 1949. 44 pp. 5s. net.]

This is a report of the seventh annual Cardozo Lecture, delivered in New York on May 25, 1948. The choice of Professor Goodhart was most appropriate not only because of his eminence here, but also because he is the nephew of Judge Lehman—Cardozo's great friend, his successor in the New York Court of Appeals and the author of the first Cardozo lecture. It is arranged under headings —how law comes into being; its growth, and its purpose and the Civilian and English views are contrasted. It is a penetrating analysis illustrated with apposite quotations from Bracton, Coke, Bacon, Hobbs, Locke, Burke, Bentham and Austin, to mention but a few. It is delightfully written and the product of original thinking. In short, English legal philosophy shuns abstract ideas in the air, it hesitates to accept generalities unrelated to facts.

T. E. L.

Law and Society. Edited by Sidney Post Simpson, Julius Stone and M. Magdalena Schoch. American Casebook Series. [St. Paul, Minn.: West Publishing Co. xlvii and 2389 pp. $25.00 net.]

This is a monumental collection of extracts from textbooks, judgments and statutes, constituting a jurisprudence casebook considered primarily from the historical-sociological angle.

The work is divided into three books, and six parts, each part being prefaced by an introduction contributed by the editors. The intervention of the editors is confined to these introductions except for footnotes and an occasional note in the body of the text.

Book One is divided into four parts. Part I deals with Law in a Kin-Organised Society. The main authorities in this part, and also in Part II, Law in an Emergent Political Society, are Gaius, Maine, Jolowicz and Westrup for Roman law, Vinogradoff for Greek law, Pollock and Maitland for English law, and Hartland and Malinowski for savage society. Part III deals with Law and the Rise of Commerce. There is more citation of case law, and selections from Blackstone, Trevelyan and Mitchell, among others. Part IV is concerned with Law and Expanding Industrialism, and

there are selections from Bentham, Mill, Austin, Dicey and Holmes and others.

Book Two consists of one part, Law in Modern Democratic Society. The number of decided cases cited is considerable, and of the authors Bohlen, Cardozo, Landis, Llewellyn, Pound, Frankfurter, Berle and Means, and the editors themselves are well represented.

Book Three is devoted to one part, Law, Totalitarianism and Democracy. There is no case law, and the selections are mainly from political rather than legal writers—Marx, Lenin, Vyshinsky, Gromyko, Mussolini, Hitler, Truman, Beveridge, Laski, Cole, Loewenstein, and the two Webbs. The book concludes with an indication of the effects of the use of atomic energy on law in the society of the future.

This is a most valuable collection of materials for teaching or study. Further, the work of selection has been so skilfully done that the collection, particularly the first two books, has a great virtue, scarcely to be expected of a reference book, that of being readable.

It would be presumptuous to criticise a choice of materials, which, according to the preface, has been engaging the attention of the editors for some fourteen years, but it does seem that the selection of English authorities has not always been happy, and the complete absence of any reference to certain contemporary English writers is surprising. True this work appears in an American case-book series, but an attempt has been made, and in the main a successful one, to incorporate English authorities.

The English writers entirely omitted include Mr. J. W. Jones, Professor Friedmann, and Professor Glanville Williams. It does seem that the section on fictions (266) would be improved by an extract from Chapter VI of Mr. Jones' *Historical Introduction to the Theory of Law*, some reference to dogmatic fictions and the case of *Daimler Co.* v. *Continental Tyre Co.* [1916] 2 A.C. 307. The work of Professor Friedmann could be represented by excerpts from Chapter 26 of his *Legal Theory* (First Edition), and would come in well at p. 792. Perhaps Professor Glanville Williams' *Crown Proceedings* was published too recently to receive a reference at p. 1292.

In the section on self-help (284) a suitable passage from Maitland, whose work is otherwise well represented, on the Beatitude of Seisin (*Collected Papers* I, 407), where he propounds the view that an extremely rigorous prohibition of self-help in the twelfth century fell to pieces in the fourteenth century, would illustrate that the progress towards the elimination of self-help as a political society emerges is not necessarily an uninterrupted one.

References to Cardozo, *Selected Writings*, p. 170, at p. 672, and to p. 35 of the same collection at p. 1402, would, it is suggested, be helpful.

Morgan v. *Fear* [1907] A.C. 425 would seem to be a more striking illustration of adherence to precedent than *Re Carrington*, digested at p. 666.

The case of *Hobbs* v. *Winchester Corporation*, digested at p. 744, is a decision of a court composed of two chancery judges and only one common lawyer on a point of English criminal law. It is not even mentioned by *Archbold* or *Russell on Crime*. It is suggested that the point would be better illustrated by *Parker* v. *Alder* [1899] 1 Q.B. 20, or *Laird* v. *Dobell* [1906] 1 K.B. 131. The same section might well contain a reference to Dr. Jackson's article in 6 C.L.J. 83.

Statutes omitted and worthy of mention are the Law Reform (Contributory Negligence) Act, 1945 (p. 1396), and two statutes of British India, the Indian Oaths Act, 1873, ss. 8 to 12 (p. 312), and the Code of Civil Procedure, 1908, O. XIV, r. 1, and O. XX, r. 5 (p. 1414).

English authorities that merit at least a footnote reference are *Hewitt* v. *Bonvin* [1940] 1 K.B. 191 (p. 760), *R.* v. *Jackson* [1891] 1 Q.B. 671 (p. 965), *Hillyer* v. *Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820, and *Gold* v. *Essex C.C.* [1942] 2 K.B. 293 (p. 1285), *Rose* v. *Ford* [1937] A.C. 826, and *Benham* v. *Gambling* [1941] A.C. 157 (p. 1527), *Bourhill* v. *Young* [1943] A.C. 92 (p. 1533), and *R.* v. *Holmes* [1946] A.C. 588 (p. 1581).

Misprints noted are at xiii, l. 34; 13, l. 14; 16, l. 19; 81, l. 4; 166, l. 30; 225, l. 18; 244, l. 17; 1229, last line; 1503, l. 13; 1505, l. 20; 1610, l. 20; 1645, l. 3; 1658, l. 3; 1676, l. 15; 2179, l. 43.

R. N. G.

The Rational Basis of Contracts and Related Problems in Legal Analysis. By Merton Ferson, Dean Emeritus University of Cincinnati College of Law, Visiting Professor Vanderbilt University Law School. [Brooklyn : The Foundation Press Inc. 1949. ix and 291 and (Table of Cases) 15 and (index) 22 pp. $4.00 net.]

This is a learned, stimulating and challenging work, ' particularly addressed to law students with a hope that they are interested in the philosophy, as well as in the rule, that sticks out of each case '. The reviewer believes it is far more valuable to the advanced student and the practising lawyer than to the beginner, for he has enough to cope with in the rules themselves. ' Troublesome problems ', says Dean Ferson, ' become simple when due regard is had for elementary ideas '. He analyses critically the problems raised by what may be termed ' blind spots, misfits or hangovers ', such as crossed offers, revocation by death of offeror, contracts by correspondence, third party beneficiaries, the unfortunate rule in *Foakes* v. *Beer*, voidable contracts and representations. His discussion is thorough and convincing and leads to the belief that the

law should be changed. On third party beneficiaries he concludes that, 'Contract obligations are commonly deemed to rest on promises. Courts have struggled to build a theory on that base. It is time to recognise that contract obligations require a broader base—*viz.*, the manifested consent of the obligor to be bound' (p. 151). On *Foakes* v. *Beer* we have '. . . The rule is not required by any of the fundamental doctrines of the common law. The consideration requirement has been dragged outside the sphere of its legitimate operation. Its use to hamper the cancellation of claims is neither "logical" nor "just"'.

T. E. L.

Joint Obligations. A Treatise on Joint and Joint and Several Liability in Contract, Quasi-Contract and Trusts in England, Ireland and in the Common Law Dominions. By Glanville L. Williams, ll.d., Professor of Public Law and formerly Reader in English Law in the University of London, of the Middle Temple, Barrister-at-Law. [London : Butterworth & Co. (Publishers), Ltd. 1949. 176 and (index) 3 pp. 21s. net.]

This is a scholarly and critical analysis of a subject of practical importance, namely, the law relating to joint and joint and several contractors. The subject is partly dealt with in the longer treatises on partnership, suretyship, bankruptcy, executors and procedure. The whole law on the subject is dealt with here; its imperfections are laid bare (see ss. 34, 80, 87, 91, 94) and a convincing case is made for its reconsideration in detail. The rule that judgment against one tortfeasor was a bar to proceedings against the others was abolished by the Law Reform (Married Women and Joint Tortfeasors) Act, 1935, but the same unsatisfactory rule as to joint promises continues. As evidence of the original material used in preparing this fascinating study, we note that some thirty-eight decisions are culled from the Year Book period, about six hundred and fifty after that period to date—English, Dominion and American; nineteen statutes, and such literature as exists on the subject have been carefully combed. The Introduction, pp. 24–32, is an outline of the whole book; the topic is dealt with in detail under the creation of joint and joint and several liability, joinder of parties, survivorship, procedure, extinction of causes of action, and the right of contribution. There are shorter chapters on the bankruptcy rules, differences between joint and joint and several liability and co-trustees and co-executors. The practitioner and student will find his conundrums dealt with here, and where authority conflicts or does not exist, a reasoned solution is offered.

T. E. L.

Cases on Criminal Law. By Rupert Cross, m.a., b.c.l., Solicitor, Fellow of Magdalen College, Oxford, University Lecturer in Law, and P. Asterley Jones, ll.b., m.p., Solicitor, Tutor at the Law Society's School of Law. [London: Butterworth & Co. 1949. xxx and 286 and (index) 17 pp. 17s. 6d. net.]

Although teachers of law carry on an unending struggle to make their pupils read cases in the original reports, libraries and syllabi are nowadays so full that some sort of case-book or digest is a practical necessity. This is the necessity for which the authors of this book seek to cater, at the same time providing a companion volume to their successful *Introduction to Criminal Law*.

The usual selection of cases is given, together with a number of up-to-date illustrations. The authors have avoided the reprehensible practice of printing in heavy type the passages which they consider to be particularly important. It is unfortunate that *R.* v. *De Banks* (1884) 13 Q.B.D. 29, finds its way into every book of this kind. It serves no purpose except to confuse the student, until he discovers that on the peculiar facts of the case the prisoner was specifically constituted a bailee of the money he received, and was therefore guilty of larceny when he made off with it *animo furandi*.

As well as the extracts from reported cases there are also thirteen 'general notes' on controversial points arising out of them. One would have thought that these notes would have been more in place in the *Introduction to Criminal Law*, if necessary in an appendix, leaving this book free for cases and simple headnotes; particularly so in view of the fact that the notes are for the most part recondite and difficult to follow. If any general discussions are necessary, they should be short and easily digestible: moreover they should be followed and not preceded by the relevant cases.

The few cases on procedure at the end of the book might well have been omitted. The authors expressly refrained from what would have been a superficial treatment of the law of evidence, and it is difficult to see why the same considerations do not apply to procedure. If the matter is not going to be dealt with fully it is best left alone.

Geoffrey Lane.

Trial of James Camb (The Port-hole Murder). Edited by Geoffrey Clark. (Notable British Trials Series, Vol. 71.) [London: William Hodge & Co., Ltd. 1949. 255 pp. 15s. net.]

This is a sound and worthy addition to the series of Notable British Trials. An admirably clear introduction by Mr. Clark summarises in logical order both the facts as brought out at the trial and also appropriate background information which is of great value to the reader.

Indeed, the latter serves to correct any tendency to doubt as to the conviction in this case which might have resulted from perusal of the necessary restricted press reports of the case. This is followed in the usual way by verbatim reports of the opening speech for the prosecution of the eminently high standard to be expected by Mr. G. D. Roberts, K.C., to whom the volume is gratefully inscribed. Then comes the evidence for the prosecution, the opening speeches for the defence, evidence for the defence and finally the charge to the jury by Mr. Justice Hilbery who tried the case at Winchester Assizes in March, 1948.

The trial and conviction of James Camb for the murder of Gay Gibson will continue to be of great legal and medical interest. Camb was alleged to have strangled his victim in her cabin on the liner *S.S. Durban Castle* when some sixty miles from the coast of Africa and then pushed her body through the port-hole into the shark infested sea. The defence was that Miss Gibson had had a seizure due to heart trouble in the course of the sexual act, so died a natural death, and that her body had been disposed of in panic by the accused. This popularly called 'Port-hole Murder' will probably be particularly remembered by lawyers as the 'Murder without a Body'. Mr. Clark at pages 25 and 26 of his introduction clearly and accurately summarises the correct view of the law on the issue of the absence of a body in a murder charge. The fallacy of the layman's view, no body, no conviction, is here exposed. There was some historical basis for this belief. Hale had advised that there should not be a conviction for murder or manslaughter where no body had been found and quotes two cases so persuading him. *Best on Evidence* mentions a case of execution for murder which was followed by the discovery of the body of the alleged victim who was then found to have fallen, when drunk, into a deep privy. As Mr. Clark points out, it has now for many years been held that Hale's rule was one of caution only and with some prescience as to more recent murder trials he goes on to state 'it would be a startling thing to let every murderer know that in order to secure immunity, he has only to destroy a body by fire, or chemicals, or sink it in the deepest part of the ocean'. It is, of course, fundamental in a murder charge that there should be clear and conclusive evidence as to the death of the victim but the production of the body in whole or part certainly is not essential. Indeed in the *Camb Case*, and that most rightly, the point was not even raised by the defence.

In view of the present interest on the issue of capital punishment, the case is of interest in that Camb, though convicted of murder—his appeal was dismissed—has in fact escaped the gallows. As the Editor states 'The "no hanging" clause of the Criminal Justice Bill, approved by the House of Commons, had been rejected by the Lords, and the Home Secretary announced that all those persons under sentence of death, while Parliament was deciding the

matter, should be reprieved. So for Camb, as events turned out, it was life imprisonment and not death'.

Finally, reading this volume serves once more to increase admiration for the superbly high standards of English justice. Camb had but to state that there were witnesses in South Africa who could be of assistance to him for them to be brought from South Africa to Winchester to give evidence for him at the expense of public funds—and this notwithstanding the fact that the absolute relevance and value of their evidence must, at all times, have been a matter of considerable doubt. Professor Webster, originally consulted by the prosecution because he considered that on available medical evidence the chances were equal that death could have occurred from natural causes as from strangulation, was made available to and in fact called by the defence. This evidence from one so eminent in his sphere was of inestimable value to the accused. While, finally, information in possession of the prosecution as to prior conduct by the accused involving young lady passengers on ships on which he had been deck steward, to which the Editor refers in his introduction, was at no stage mentioned by the prosecution during the trial.

The volume is extremely well and most conveniently illustrated with plans and photographs. The thriller reading public no less than the lawyer should find real value here.

T. Mervyn Jones.

The British Year Book of International Law, 1947, Vol. 24; *1948*, Vol. 25. Edited by Professor H. Lauterpacht. [London: Geoffrey Cumberlege; Oxford University Press. 1949. xi and 529 pp.; viii and 507 pp. 45s. each net.]

The two volumes under review show the same characteristics as the *Year Book* for 1946 (see this Journal, vol. 10 (1949), p. 303). The emphasis of articles and notes is upon International Organisation and upon topical questions. The *Year Book* for 1947 contains contributions on the International Control of Atomic Energy (Bathurst), Admission to the United Nations (Humber), the Settlement of Disputes in the Security Council (Liang), the Trusteeship System (Duncan Hall) and the place of Neutrality in the present International System (Lalive). More specifically legal problems discussed in this volume concern the Progressive Development of International Law and Codification (R. Y. Jennings), the Immunities of Subordinate Diplomatic Staff (Miss Gutteridge), Piracy and Title to Goods (Wortley), and State Succession in the Matter of Treaties (Dr. J. M. Jones). Topical articles deal with German External Assets (Dr. Mann), the Treatment of Private Property in the Paris Peace Treaties (Dr. Martin),

the Release of the *Altmark's* Prisoners (Prof. Waldock) and with Prize Law during the Second World War (Rawson). Mr. Lyons examines carefully the practice of American courts concerning Suggestions and Certificates of the American State Department.

The same division of material is noticeable in the *Year Book* for 1948. International Organisation is represented by articles on the Binding Force of Recommendations of the General Assembly (Sloan), the Development of International Law through the Legal Opinions of the United Nations Secretariat (Schechter), the Compulsory Jurisdiction of the International Court (Hambro) and the Universal Declaration of Human Rights (Lauterpacht). On the other hand, the general Law of Nations is given somewhat greater prominence than in previous years, and a wide range of subjects is examined. This includes State Trading (Fawcett), Extraterritorial Asylum (Miss Morgenstern) and the Conclusive Effect of Statements of the Executive in Continental and Latin-American Practice (Lyons). A welcome revival of interest in British practice permeates the studies on the British Nationality Act, 1948 (Dr. J. M. Jones), the Termination of Diplomatic Immunity (Dr. R. G. Jones), and the Anglo-American Consular Convention (Best) and has led to particularly noteworthy results in the study on International Law in Early English Practice (Dr. Schwarzenberger). Lord Wright's study on the Killing of Hostages as a War Crime and Prof. Waldock's detailed essay on the Sovereignty over the Falkland Islands are both of topical and of general interest. The remainder of the volume is taken up by Notes, Book Reviews and by the Documentary Section on Constitutions of International Organisations, prepared by Mr. C. Parry, which has become a very valuable permanent feature of the *Year Book*.

Both volumes deserve high praise. The shift from customary international law as developed over the last three centuries towards an autonomous system of institutions has come to stay, and the *Year Book* rightly reserves first place to the discussion of organisational questions. The articles on topical matters raise ephemeral disputes into the sphere of principle and history. The permanent value of these volumes is assured.

K. L.

Vorkriegsverträge in Friedensverträgen. By Ernst Wolff. Beiträge zum Ausländischen und Internationalen Privatrecht, Vol. 19. [Berlin and Tübingen : Walter de Gruyter and J. C. B. Mohr. 1949. xii and 196 pp. DM. 8.80.]

This book is based upon the author's previous publications entitled 'The Problem of Pre-War Contracts in Peace Treaties' (1946) and

'Treatment of Post-War Contracts in the Peace Treaties of Paris, 1946' (1948) 33 *Transactions of the Grotius Society* 213–228. Its purpose is two-fold. In the first place it is an introduction to the International Law concerning the effect of war on treaties. This growing branch of law which is based exclusively on treaty practice, constitutes an adaptation of the domestic law on this subject to the relations between States. In the second place the book is a guide for the draftsman of the future Peace Treaty with Germany based upon the Peace Treaties after the First World War and those concluded with the satellite countries after the War of 1939–1945, on the one hand, and the experience of the Mixed Arbitral Tribunals which operated under the treaties of 1919, on the other. The author's great experience, extensive knowledge of German and English law, his constructive and critical approach, and his concise style go to make this book not only a handbook for peace makers but also an important contribution to a branch of the law where international law and domestic law meet.

K. L.

Die Grossmachtstellung im Völkerrecht. By Dr. H. Mosler. [Heidelberg: Verlag Lambert Schneider. 1949. 52 pp. DM. 2.]

The Professor of International Law in the University of Frankfurt in his inaugural lecture has made the interesting attempt to view the development of International Law in the nineteenth and twentieth centuries in the light of the influence exercised by the major Powers upon the law and organisation of the community of nations. He stresses the directory rather than mandatory character of this influence which manifested itself first in the great conferences held during the past century and which is enshrined today in the provisions of Chapter VII of the Charter. The sovereign equality of the smaller States appears thus as the negative right to resist arrangements of the great Powers in so far as they are outside the sphere of policy and the enforcement of peace.

K. L.

The Relativity of War and Peace. A Study in Law, History and Politics. By Fritz Grob. [New Haven: Yale University Press. London: Geoffrey Cumberlege. 1949. xviii and 402 pp. 40s. net.]

Dr. Grob's work deals with the problem of defining the concept of 'war'. The question is one of great practical importance. It has arisen in municipal courts with reference to the interpretation of

statutes and private contracts relating to war conditions. In the international sphere it has arisen with regard to the exercise of belligerent rights. Above all, inadequate definition of the concept of war has impeded international action designed to prevent breaches of the peace.

Broadly, Dr. Grob's thesis is that war is not 'indivisible', but that there may be war for the purpose of applying some legal rules, municipal or international, relating to war, while there is 'peace' as far as the applicability of other rules is concerned. In this he follows the practice of American courts in recent years. With a wealth of historical evidence he propounds his thesis and demonstrates the difficulties which have arisen from the classical concept of war.

Various points of Dr. Grob's argument are open to challenge. Thus, while he demonstrates convincingly that hostile operations without a declaration of war may be regarded as war in relation to many legal rules, he perhaps does not prove equally satisfactorily that a declaration of war unaccompanied by military operations cannot confer a right to exercise belligerent rights on the high seas or to take measures against enemy property. Similarly, it is difficult to see why he describes the 'laws and customs of war' somewhat slightingly as a 'natural law concept', when he admits that States in practice apply them in all hostilities. But the work as a whole is a real contribution to the understanding of concepts such as 'war' and 'measures of force short of war'. Moreover, so alive is the author to the humour of many of the historical situations with which he deals that the reader, expert or layman, will not have a dull moment.

F. M.

Yearbook on Human Rights for 1947. [Lake Success : United Nations. London : H.M.S.O. 1949. xiv and 581 pp. 30s. net.]

This is the second volume prepared by the Human Rights Division of the United Nations Secretariat and intended to present a survey of legal developments, both national and international, concerning the protection of human rights. Like its predecessor, from which it differs somewhat in content and arrangement, it provides an extremely valuable collection of sources for those interested in this vital problem.

The first part deals with constitutional and other national enactments relating to human rights which were promulgated during 1947. This is a useful compilation—and admirable translation—of documents which are, in the main, inaccessible to the ordinary student. It is a matter for regret, however, that it has been decided not to include in this section decisions of municipal courts

relating to human rights. The test of the usefulness of legal provisions would seem to lie in the spirit in which they are interpreted and applied in practice.

The second part deals with international Treaties concluded in 1947 which refer to human rights. These are, mainly, the Peace Treaties with Italy, Finland, Hungary, Roumania and Bulgaria, and various Trusteeship Agreements.

In the third part the activities of the organs of the United Nations entrusted with functions relating to human rights are summarised, and a Documentary Annex gives the texts of the most important resolutions of these organs relating to human rights. For reasons of space the documentary section must be selective, but Part III gives a good general survey of the various activities, and students desirous of studying the subject in greater detail will find full references to the relevant United Nations Records.

F. M.

Historical Survey of the Question of International Criminal Jurisdiction. Memorandum submitted by the Secretary-General of the United Nations. [Lake Success : United Nations. London : H.M.S.O. 1949. 147 pp. 7s. 6d. net.]

This Memorandum was drawn up for the use of the International Law Commission in considering the question of the desirability of establishing an international judicial organ for the trial of persons charged with genocide and similar crimes. The first fifty pages give a brief survey of the occasions on which the question of international criminal jurisdiction has been discussed by official and unofficial organs. The remainder of the Memorandum consists of documentary Appendices containing extracts from international instruments and drafts relating to this matter.

The Memorandum is purely historical, that is, it does not discuss the problems involved, but merely records the attitude of States and scientific organisations. It fulfils that task lucidly and concisely. Moreover, as the objections to an international criminal court have not varied greatly between 1920 and 1950, the main problems stand out well enough. The chief obstacle to the establishment of such a court would seem to be the reluctance of States to recognise that individuals can have international duties, and can be subject to an international jurisdiction. With regard to this point there has been a distinct retrogression since the signing of the Nuremberg Charter. Many of the signatories to that instrument have been reluctant to admit, in United Nations discussions, that heads of States can be individually liable for the crimes of the State, or that States can relinquish their penal jurisdiction in favour of an international court. It is unfortunate that their attitude

should in such a way lend force to the argument—which the writer of the present review still believes to be inaccurate—that the Nuremberg Charter was not, as was claimed at the time, a striking improvement in the application of the international law of war, but was merely an instrument of the victor for the effective suppression of the vanquished.

F. M.

Yearbook of the International Court of Justice, 1948–1949. [The Hague: International Court of Justice. 1949. 163 pp.]

The *Yearbook* provides a wide and varied range of information relating to the International Court of Justice. Chapter I deals with the organisation and composition of the court and the registry. Chapter II provides information concerning the Statute of the Court and signatories to it. Chapter III deals with the jurisdiction of the court *ratione materiæ* and *ratione personæ*. Thus it lists the States bound by the 'Optional Clause' of the Statute of the Court. More detailed information regarding the Optional Clause and other international instruments establishing the jurisdiction of the court is given in Chapter X, which is probably the most useful chapter of the book. Chapter IV gives a list of the decisions and orders of the court, and prints the General List of the court. In Chapter V the judgments of the court in the *Corfu Channel Case*, and the Advisory Opinion on *Reparation for injuries suffered in the service of the United Nations* are summarised. Chapter VI provides a Digest of Decisions in application of the statute and rules of the court. For the rest there is a list of the publications of the court, a statement of the accounts, and, in Chapter IX, a bibliography of books and articles directly or remotely relating to the court and its work.

F. M.

Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository. [Lake Success: United Nations. London: H.M.S.O. 1949. vii and 139 pp. 9s. net.]

This is a useful summary of the state of ratification on November 15, 1949, of multilateral Treaties in respect of which the Secretary-General acts as depository, and of the reservations to which some signatures are subject. It provides some startling information. Thus the Genocide Convention has apparently been ratified by only four States, and the United Kingdom is not even a signatory to it.

F. M.

International Monetary Fund. Annual Report, April 30, 1949. [Washington: International Monetary Fund. 1949. 122 pp.]

International Monetary Fund. Schedule of Par Values, 9th Issue (December 1, 1949). [Washington: International Monetary Fund. 21 pp.]

International Monetary Fund. Financial Statement for the Quarter ended October 31, 1949.

The Annual Report is an informative booklet relating to all aspects of the work of the Monetary Fund. It contains six short articles on international financial problems, in the course of which the desirability of wider convertibility of currencies, and of orderly exchanges rates is stressed. These are followed by documentary appendices dealing with changes in the monetary policy of some States, the composition of the organisation and its governing organs, decisions by the Executive directors on some obligations incumbent on members of the fund, the balance sheet for the year April 30, 1949, and the Schedule of Par Values as of July 1, 1949.

In the ninth issue of the Schedule of Par Values these are given as of December 1, 1949. The changes in various currencies subsequent to the devaluation of the £ sterling are thus included.

The financial statement for the quarter ended October 31, 1949, is a small leaflet containing merely a balance sheet, and a summary of the transactions of the fund.

F. M.

Simon's Income Tax Law. Editor-in-Chief: The Rt. Hon. Viscount Simon. Vol. I, xvi and 523 pp.; Vol. II, xii and 414 pp.; Vol. III, xii and 450 pp.; Vol. IV, Statutes, Orders and Appendices (containing Index and Service Volume). [London: Butterworth & Co. (Publishers), Ltd. 1949. £15 15s. net. £2 12s. 6d. for annual service volume.]

If ever of a subject it can be said with Cicero *Magnum opus est egetque exercitatione non parva*, income tax is that subject. To make the task lighter, as Lord Simon has explained in the preface, this book has been published. In three volumes of text, one loose-leaf edition of the Finance Acts and two other loose-leaf volumes containing in all some 19 Parts, 21 Divisions, some 2,750 pages, a group of some 22 contributors under the general editorship of Lord Simon have expounded the law of income tax with a completeness hitherto unknown. The first three volumes explain the law, treating the subject where possible from basic principles and giving examples of accountancy practice, the other volumes, all loose-leaf, contain a copy of the Acts—a welcome volume which does not

reproduce the bulkiness of the Brown Book—a full index of cases, a general index, and a volume for current additions.

In so large a book there are comparatively few subjects to criticise. Division 2, Part I, on the history of income tax is both extensive and admirable. The chapter on the general principles of construction neglects to deal with two cases, *Frankman* v. *Anglo-Prague Bank* [1948] 1 K.B. 780 and *Kahler* v. *Midland Bank* [1948] 1 All E.R. 811, which show that English courts are now beginning to recognise the revenue laws of foreign countries. The statement on p. 314 of Volume I that ' every person at birth becomes a member of a political society ' is open to criticism. The chapter on residence and domicile treat these subjects with no reference to that large body of literature, both English and foreign, which one has to consult so often. The chapter on settlements ignores articles and precedents published in *The Law Times*, Vol. 203, and *The Conveyancer*, Vols. 10 and 11; and it is suggested that a section on the interpretation of wills and settlements should be included in that on construction of statutes. *The Oxford Group Case* [1949] 2 All E.R. 537, shows how important the ability to draft properly still remains.

There are no doubt those who may declare of this work *οὐ μέν βρᾱχείς ἀρκῶσι, μή πολλοῖς χρῆσθαι* and return to the smaller Konstam, a book of about 800 pages, or Tolley, some 100, a miniature but nevertheless a masterpiece, which the reviewer still uses in practice.

Simon, it is suggested, will be of more use to the practitioner who needs a book to explain the law to him *ab initio* rather than to the person who knows his way about what Lord Simon has called ' the labyrinth built up by the Acts ' and needs but an index to the cases to allow, if Lord Simon's metaphor may be continued, the revenue ' Theseus ' to find his way out. *Simon* is certainly *situ pyramidium altius* but it is not yet certain that it is a *monumentum aere perrennius*.

L. S.

The Assessing of Salvage Awards. By Charles T. Sutton, m.com., d.sc.(Econ.) (London), Fellow of the Royal Statistical Society. First Edition. [London: Stevens & Sons, Ltd. 1949. xvi and 751 pp. and (index) 5 pp. £6 6s. net.]

Dr. Charles T. Sutton has analysed more than 400 Salvage Awards made by the Admiralty Division of the High Court during the period 1919–1939. This careful and detailed investigation commences with a short classification of the more important factors which determine the merits of salvage services, and the various mishaps and incidents which require vessels to come to the assistance of sailors and ships are then separately considered and analysed. These factors and

causations are tabulated and assessed on a percentage basis in relation to a possible award for each type of service.

The bulk of this large volume consists of a considerable number of analysed judgments in chronological order according to dates of trial (270 pp.), and a detailed consideration of the same cases under chapter headings relating to the type of incident or condition which made the rendering of the services necessary (372 pp.). There is, further, a table setting out all judgments previously discussed and, in the last two columns of this table, the ' analysis award ' in each case is compared with the actual award made by the court.

Dr. Sutton finally reviews his analysis and comes to this conclusion, amongst others, that there is remarkable consistency regarding the amounts awarded by the various judges. The cases selected for analysis justify that conclusion but I doubt that there is any reason for the apprehension that the present tendency to resort to arbitration in preference to asking the court to assess the award, might lead to lessened consistency and to diminished certainty. The numerous awards made by arbitrators would appear to be just as intrinsically sound and consistent with each other as the awards made by the Admiralty Division.

A cross-index would facilitate reference from one analysis to another, and an additional column in the ' Abstract of Cases ' setting out references to Lloyd's List Law Reports would have been useful. An integration of the several analyses would probably enhance the value of this erudite and carefully composed book by reduction in bulk and simplification of argument.

This book will certainly prove to be of interest to all concerned with the law appertaining to ships generally and to salvage in particular.

D. H. Hene.

Unemployment Insurance in Great Britain, 1911–1948. By Sir Frank Tillyard, c.b.e., m.a., m.com., of the Middle Temple, Barrister-at-Law, Emeritus Professor of Commercial Law, University of Birmingham. Assisted by F. N. Ball, ll.b., Solicitor of the Supreme Court. [The Thames Bank Publishing Co., Ltd. 1949. ix and 204 and (Appendices and Index) 29 pp. 21s. net.]

This book provides a detailed history of unemployment insurance legislation in this country from the enactment of the National Insurance Act, 1911 (Part II) to the coming into operation on July 5, 1948 of the National Insurance Act, 1946.

The object of the Act of 1911 was to alleviate the burden of unemployment in a few selected industries by a scheme of mutual insurance, whereby benefits were secured to unemployed workmen in those industries as of right, though for a limited period; such

benefits were paid out of an unemployment fund contributed to by employers and employed and (to a lesser extent) by the State. The standard benefit rate in 1911 was only 7s. a week (or one-third of a week's wages for an unskilled labourer at that time), compared to 26s. a week today, but the soundness of the foundations then laid is shown by the fact that the same principles have continued to govern most of the subsequent legislation on the subject, and many of the most important provisions of the Act of 1911 were substantially reproduced in the consolidating Act of 1935 and in the National Insurance Act, 1946.

The main lesson which is underlined in this book is that a true scheme of unemployment insurance cannot do more than provide alleviation for limited periods of time and subject to strict conditions (of which the most important is the preceding payment of contributions by the insured workmen). It is not designed to provide complete maintenance grants, nor to deal with prolonged or mass-unemployment, and in times of depression the whole basis of a State insurance scheme will be challenged unless there is an alternative and entirely separate provision for State assistance to those outside the range of insurance benefits.

Sir Frank Tillyard also emphasises the desirability of keeping the supervision of unemployment insurance as far as possible outside political control (this being the object for which the Statutory Committee was set up in 1934), and the importance of studying the effect of unemployment insurance upon industrial organisation and economic efficiency and relating it to measures for the improvement of the employment market.

The findings of the Royal Commission of 1930, and the work of the Statutory Committee are fully dealt with, and the final chapters show how the former unemployment insurance scheme has been absorbed into the wider social security plan envisaged in the Beveridge Report, and the former unemployment fund absorbed into a social insurance fund covering several kinds of insurance under a unified scheme. The main changes are seen to be the splitting up of the former Statutory Committee, and the greatly increased powers of the Minister under the new Act.

The historical experience and the information to be found in this book will be particularly useful to those concerned with the working of unemployment insurance in a society which, it is sometimes feared, may not always have the benefit of full employment.

C. Barry.

The Modern Law of Water Supply. By E. J. O. Gardiner, ll.b. (London), Solicitor of the Supreme Court, Town Clerk and

Clerk of the Peace of Andover. [London: The Solicitors' Law Stationery Society, Ltd. 1949. lxiv and 573 and (index) 18 pp. £5 net.]

Mr. Gardiner has set out to deal with the new legislation relating to the public supply of water for the benefit of those engaged in the practical application of that legislation. The book contains the Water Acts of 1945 and 1948 and Part IV of the Public Health Act of 1936 annotated in a comprehensive and lucid manner.

The author has written a short introductory note to the Water Act of 1945, setting out the history of the Act and mentioning the principal changes of particular importance which the Act has made. An Appendix contains the Reservoir (Safety Provisions) Act, 1930, the Statutory Orders (Special Procedure) Act, 1945, the relevant provisions of the Local Government Act, 1948, and the various regulations of general application. In sum, the book, while remaining a moderate and convenient size, provides a complete statement of the law revised to April 1, 1948.

Mr. Gardiner had the misfortune to have been overtaken by the introduction of the Bill which has become the Water Act, 1948, after he had completed the work as originally planned. It was therefore necessary not only to insert the Water Act, 1948, but to add in the Appendix a noter-up of the first part of the book. He has reduced the inconvenience of this arrangement to a minimum by marking in the margin all passages in the text affected by the new legislation, with a reference to where the amendment will be found.

This book is, as one might expect, a thoroughly sound work, providing in a practical form a useful guide to this new legislation. It will be very welcome among those concerned with this subject. One only regrets that it has not been possible to produce it at a lower price.

Christopher Hodson.

Cases on Labor Law. By Archibald Cox, Professor of Law, Harvard University. 1948. [Brooklyn: The Foundation Press, Inc. 1421 and (index) 10 pp. $8.50 net.]

Cases on Private Corporations. Selected, edited and arranged by I. Maurice Wormser and Judson A. Crane. [Indianapolis: The Bobbs-Merrill Company (Publishers). 1033 and (index) 20 pp. $7.00 net.]

The first of these books appears in the now monumental American 'University Casebook Series' produced under an editorial board including the Professors of Law of Harvard, Yale, Stanford and

Columbia Universities, and the Deans of the Law Schools of Harvard, Minnesota, Illinois, Texas and Duke Universities. We have nothing like it in this country.

The second book is based on the earlier *Canfield and Wormser's Cases*, the third edition of which was revised by Mr. Wormser in 1932.

Both demonstrate to the respectful but slightly overawed reader the painstaking industry and selective care with which cases and other materials affecting a wide range of subjects are placed before the student and practitioner in the United States.

F. J. O.

War Crimes Trials. Vol. IV, The Hadamar Trial. Edited by Earl W. Kintner. xxxvii and 250 pp. Vol. V, The Natzweiler Trial. Edited by Anthony M. Webb. 233 pp. [London: William Hodge & Co., Ltd. 18s. each.]

The Hadamar Trial was the trial before an American Military Tribunal of the administrative head of a sanatorium in Hadamar, a physician, nurses and others charged with murdering several hundreds of Polish and Russian nationals by poisonous injections, under pretence of treating them for tuberculosis. The report leaves one with a wish that a stricter procedure were prescribed for such trials. Hearsay evidence and leading questions are permitted, and the accused who do not wish to give evidence are more or less forced to the witness stand. But the deepest impression left on the mind is the horror of the charges, and the damning evidence of the unspeakable guilt of the accused.

The Natzweiler Trial before a British Military Court falls into a different category. The accused, officials of a concentration camp, were charged with murdering four women, two British, one French, and one of unknown name and nationality, by poisonous injections. The prosecution admitted that these women had been brought from Britain by aeroplane, and parachuted in civilian dress behind the enemy lines. They acted as couriers in the resistance movement in France until captured. The defence case was that they were spies and had been sentenced to death. The prosecution averred that they were not spies, and were done to death without trial.

The Judge Advocate, in his summing up, refers to Rule 162 of the Hague Rules to the effect that persons sent in balloons to maintain communications are not as such liable to be treated as spies, and leaves it open to the court to hold that the deceased were not therefore spies, though he concedes that the question is a doubtful one. He then refers to the 'considerable amount of evidence' that there was no trial, and the court find six of the prisoners guilty, acquitting four.

The attitude of the editor is to regard the crime as one of unparalleled horror even where the concentration camp is concerned. The Attorney-General in a foreword remarks that all that could be said in favour of the accused was said. But surely these heroic women were spies, in the honourable sense it is true, but spies none the less. At least it seems that the Supreme Court of the United States, who considered the *habeas corpus* application in *Ex p. Quirin* (1942) 317 U.S. 1, would have had no doubt in the matter. Quirin and his companions, all German nationals, landed in the United States secretly from a submarine, buried their uniforms and were arrested with explosives in their possession. The only question to be decided was whether the petitioners were subject to military law, and the court so held. The material given at pp. 14 to 17 of this report suggests that the gallant women parachutists of Natzweiler were spies according to American law, according to English law, and according to international law, for carrying messages is as incriminating as carrying explosives. Rule 162 is not an extraordinary rule, pace the Judge Advocate. It was intended to safeguard from summary court martial and execution persons observing from balloons, whom the Prussians in the war of 1870 treated as spies because they were out of control of the outposts—(see *Hall on International Law*, 8th edition, 651). It was never designed to protect persons who secretly descend from balloons in civilian guise and mingle with the population. That being so, the gravamen of the charge against the Natzweiler accused is reduced to this—that they executed spies without trial. It is suggested that this crime is not on a par with the slaughter of the innocent of which so many Nazis and doubtless also these accused were guilty (for the four acquitted were later sentenced to death for other war crimes). What chance of acquittal would these women have had as accused in the courts of any belligerent nation during wartime, let alone those of Hitler? It is suggested that the honour we do to these heroic women should not blind us to the fact that one of the reasons why we do hold them in such honour is that for the sake of their country and of mankind in general they played a dangerous game, and from the moment they landed in France their lives were in pawn. There is nothing to be gained by labelling their execution as an atrocity.

R. N. G.

The Trial of von Falkenhorst. Edited by E. H. Stevens, Esq., o.b.e., w.s. With a foreword by The Right Hon. Sir Norman Birkett, p.c. [London: William Hodge & Co., Ltd. xlii and 278 pp. 18s. net.]

This book records the proceedings at the trial of Generaloberst Nikolaus von Falkenhorst before a British military court at

Brunswick in July, 1946. It is a worthy addition to the 'War Crime Series'. The editor, in his preface, gives a cogent review of the facts and the law which governed the case. Sir Norman Birkett in an excellent foreword places the case in its setting against the Nuremberg Trials.

The book is interesting to the student of Public International Law mainly because of the prominence of the defence of obedience to inferior orders which was cleverly argued by the counsel for the accused.

(Von Falkenhorst was Commander-in-Chief of the German armed forces in Norway from April 10, 1940, to December 18, 1944. In this capacity he received from Hitler in October, 1942, the following manifestly illegal order:—

> 'From now on all opponents brought to battle by Germans in so-called Commando operations . . . are to be exterminated to the last man . . .'. With the order was an explanatory note which ended 'should it prove advisable to spare one or two men in the first instance for interrogation reasons they are to be shot immediately after their interrogation'.

The accused said of the order at his trial 'I was in opposition to it in my conscience but as a soldier I had to obey'. The Fuehrer's word was law. It would not pay a senior officer to question the legality of such an order. The defence, however, failed to bring forward a specific case where any officer had been killed for refusing to obey such a command and the prosecution maintained that there was always open to the accused the alternative of resignation. The carrying out of the order having resulted in the cold-blooded murder of certain allied soldiers captured in Norway, the accused was found guilty and sentenced to death. The sentence was later commuted to life imprisonment.)

To the student of the laws of evidence interest in the trial will also lie in the nature and substance of the evidence adduced by the prosecution. (One witness only with personal knowledge of the events at issue was called by the prosecution. His evidence was vague and by no means conclusive. The bulk of the case rested on affidavits voluntarily made by the accused and also a number of persons who for some reason could not be present at the trial. Statements thus brought before the court were not open to cross-examination by the defence. History might question the wisdom of the grave dereliction, however efficacious at the time, from the principles and traditions of British justice.)

To the general reader the book will give an absorbing and at times terrible picture of the dangers faced by those small groups of men who raided the Nazi-dominated coast-line of Europe.

D. H. Griffiths.

Soviet Civil Law. By Vladimir Gsovski. [Ann Arbor. University of Michigan Law School. 1948 and 1949. Two volumes. Vol. I, xxxvii and 909 pp. Vol. II, xx and 907 pp. $10.00 net.]

It is possible here only to note and describe rather than to review this important and most interesting book. The author is the Chief of the Foreign Law Section of the Library of Congress and is particularly well qualified to deal with the subject, though his approach is necessarily from the outside, as contrasted for example to Vyshinsky's *Law of the Soviet State* recently published by Macmillan. The object of the book, as stated in Professor Hessel E. Yntema's foreword, is to provide the English speaking world with objective information on the régime of private rights evolving in Soviet Russia. This evolution, and the apparent revival of traditional conceptions under the restrictive conditions of a socialised State of the communistic type, is a phenomenon of the highest importance and a fascinating subject of study. Dr. Gsovski states the question in these terms: what is the fate under the Soviet régime of the legal concepts thus far operative in all civilised societies?

The book began as a translation of the basic documents. In the present arrangement the translations are contained in Vol. II. The main documents translated are the R.S.F.S.R. Civil Code, the Code of Laws on Marriage, etc., and the Code of Civil Procedure, which are translated in their entirety. There are numerous excerpts concerning, *e.g.*, Nationality, Patents and Copyright, Agrarian Legislation, Labour Law and the Judiciary. Moreover, in the text are inserted long and most interesting comments. The volume concludes with an extensive bibliography, a Table of Statutes and a Table of Cases, the number of which is striking. The law is stated as on July 1, 1947.

Valuable as Volume II may be, it is Volume I which will most attract the general reader. Here Dr. Gsovski gives a general view of the subjects on which the documents bear. After an historical introduction, he considers the present position under three headings: political, economic and social. There follow three chapters of extreme interest: the Soviet concept of law in general, the Soviet Theory of Private Law, and the Role of the Judiciary. Then in the second part of the same volume the author discusses a numerous series of special topics. The following may be mentioned: the conditional protection of private rights, legal personality contracts, torts and particularly the theory of liability, property and inheritance, the collective farm, Labour Law, and Civil Procedure.

It is hoped that this note sufficiently stresses the reviewer's sense of the importance of this book, which is admirably printed and produced by the University of Michigan Law School as one of the 'Michigan Legal Studies'.

C. J. H.

La Posizione Costituzionale del Presidente della Repubblica. By Serio Galeotti. Pubblicazioni del l'Università Cattolica del Sacro Cuore. Nuova Serie, Vol. XXVII. [Milan: Ufficio Editoriale della Università Cattolica. 1949. vi and 55 pp.]

This somewhat ponderously written essay by a young scholar deals with the place of the President in the New Italian Constitution. It is not a commentary on the relevant sections of the Constitution but an attempt to assess the place of the Presidency by means of a comparison with the office of the Head of the Government in previous Italian Constitutions and in some European countries. Notwithstanding a certain prolixity of style and a certain reliance upon the writings of political scientists the study is strictly legal with a tendency towards legal formalism.

K. L.

An Index to the Law Quarterly Review. Volumes 1–64. By T. A. Blanco White, of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1949. xv and 286 pp. 25s. net.].

Planned by Mr. R. E. Megarry, the Assistant Editor, and prepared by Mr. Blanco White, here is a model of what an index should be. It is comprehensive and conveniently arranged, and provides a masterkey to a treasure house of legal learning. It is a herculean task admirably performed. After Professor Goodhart's Foreword in which he pays a tribute with which all will agree, there are notes on using the index which are clear and concise and they show the relation of the year and volume number. Then comes a table of subjects, the actual index of subjects under headings and subheadings arranged systematically under the different divisions of legal subject-matter. The print is set in various types to facilitate reference, and there are copious cross-references. Then follows a list of contributors of articles and a table of cases giving the year of the decision.

T. E. L.

Cheshire's Modern Law of Real Property. Sixth edition. By G. C. Cheshire, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, Formerly Vinerian Professor of English Law in the University of Oxford, and Fellow of All Souls College, Oxford. [London : Butterworth & Co. (Publishers), Ltd. 1949. xlv and 838 and (index) 72 pp. 38s. 6d. net.]

The sixth edition of a book from which most people have learned their modern real property since 1925 calls for no commendation

for it has established itself as a classic. It is hoped that the demands made upon the former Vinerian Professor of English Law by his works on private international law and contract will not prevent him from preparing the next edition of his *Real Property*. This edition has been kept within reasonable bounds by a considerable re-arrangement of several topics, and the enlargement and curtailing of others. The accounts of the simplification of conveyancing by the 1925 legislation and the maxim once a mortgage always a mortgage have been shortened without loss of clarity. The parts dealing with covenants to repair and not to assign, and the chapter on wills have been much enlarged. The main new material deals with the Town and Country Planning Act, Rent Restriction Acts, the determination of tenancies and the application of the rule against perpetuities to powers of appointment. The section dealing with the distinction between settled land and land held on trust for sale, now appears in the chapter on life interests. These improvements will meet with general approval. The all-important Town and Country Planning Act, 1947, merits, perhaps, more than the three pages devoted to it, and the divergent views as to its effect upon tenure could be mentioned. We should welcome more detail on the effect of *Wheeldon* v. *Burrows* and section 62 L.P.A., 1925, at pp. 237–240, and upon what constitutes a life in being at pp. 484–5. At p. 574, line 8, 'extremely unusual' would be more accurate than 'impossible'; at p. 677, line 21, dealing with official searches, the period was extended from *two* to *fourteen* days by the Land Charges Rules, 1940. In the fifth edition, p. 356, the second branch of the rule in *Wild's Case* was stated to be 'still law'; at p. 338 of the present edition as 'no longer operative'; perhaps some more explanation should have been given. This edition is the best yet; it is the best of the longer textbooks on this intricate subject.

T. E. L.

Goodeve's Modern Law of Personal Property. Ninth edition. By R. H. Kersley, M.A., LL.B., Solicitor. [London: Sweet & Maxwell, Ltd. 1949. lxv and 644 and (index) 55 pp. 45s. net.]

The editor states that in the general arrangement of the subject-matter no important changes have been made in the new edition, but that parts of the text have been rewritten in consequence of statutory changes, namely the Trade Marks, Inheritance (Family Provision) and Hire-Purchase Acts of 1938, the Limitation Act, 1939, and the Companies Acts of 1947 and 1948. The reviewer is convinced that hardly a page of the previous edition remains the same in the present one; there are many improvements in substance, form and set-out, and much more work has been done than

the editor would have us believe. It is fortunate that a pupil of the late Dr. David T. Oliver, who sponsored so many editions and fathered so many of us in learning the law, should be responsible for the present edition, and he has acquitted himself with that learning, skill and care we would have expected of him.

The amendments proposed in the Patents and Design Bill, 1949, are dealt with at pp. lxiii-lxv. They became an Act, bearing that name, since the book was published, and are now consolidated in the Patents Act, 1949, and the Registered Designs Act, 1949. A search for recent leading cases, in such parts of this wide field as the reviewer is acquainted, shows that nothing of importance has been overlooked; the revision is thorough and up-to-date. *Dawson (Clapham), Ltd.* v. *Dutfield* [1936] 2 All E.R. 233, which deals with the nature of a contract of sale for a fixed price in money and other goods, might have been added at p. 110 (*x*); and at p. 200 reference could usefully be made to the learned articles of Bailey in 47 L.Q.R. 516 and 48 L.Q.R. 248, and 547 on the history of the assignment of choses in action.

T. E. L.

An Historical Introduction to English Law and its Institutions. By Harold Potter, ll.d., of Gray's Inn, Barrister-at-Law, Professor of English Law in the University of London. Third edition [London: Sweet & Maxwell, Ltd. 1948. xxiv and 630 and (index) 20 pp. 37s. 6d. net.]

That this book has deservedly become popular with students is shown by the necessity for this welcome new edition, earlier than had been expected, due to the exhaustion of the reprint of the second edition. In consequence Professor Potter was, as he states in his preface, unable to carry out the drastic revision he had intended, particularly in regard to Part I (Preliminary Survey of Legal Development) and Part IV (History of Equity). Thus, besides a considerable amount of rewriting in order to simplify or reinforce the treatment of various topics and to incorporate the results of recent research, this edition contains two major alterations.

The first of these appears in Part II, Chapter IV, which, under the title of 'The Conciliar Courts, or the History of Administrative Tribunals', combines two chapters of the former edition and draws a stimulating comparison between the group of Conciliar Courts of the Tudor and Stuart period and the larger spate of more limited administrative tribunals of the present day. The learned author regards such tribunals as an inevitable necessity, but neither supports nor condemns the present system. He points out that in the past such executive-controlled tribunals have either developed into

law courts independent of the executive or else have disappeared: the chapter ends with a brief analysis of the differences between the old and the new and leaves the reader to make his own prophecy for the future of such tribunals. Whatever views one may hold on this controversial topic the inclusion of some discussion of these bodies must surely be most welcome, since the beginner, for whom this book is designed, finds it all too easy to overlook the fact that 'a host of controversies as to private rights are no longer decided in courts'. The only criticism prompted by this chapter is a wish that the topic had been more fully discussed.

The second major change is the inclusion in Part III, Chapter IV, of a section devoted to the torts of Trespass to Land and Nuisance. The new material gathered here will make the student's task in finding information concerning the origins and development of Nuisance less unrewarding than before, and should assist in explaining some apparent incongruities in the present law.

In reference to criminal appeals to the House of Lords, the statement on p. 177 that no appeal lies from an acquittal is misleading, in that an appeal does lie, at the instance of the prosecutor, under section 1 (6) of the Criminal Appeal Act, 1907, whereby the House of Lords may reverse the decision of the Court of Criminal Appeal quashing a conviction and thus restore the conviction by the court below (*R.* v. *Ball* [1911] A.C. 47). On p. 179 the date of the Statute of the Staple, 1353, is given as 1386.

The student is likely to find the study of the history of property law more difficult than that of contract or tort, due to the separate treatment of Law and Equity, except in the development of mortgages where it was found necessary to take the legal and equitable rules together (p. 612 ff.).

The minor criticisms expressed above do not detract from the value of this book. Professor Potter constantly quickens one's interest by illuminating comparisons, whether of similarities or of differences, between past and present; and the inclusion of the main facts of social and economic development as the background for the growth of the law both brings the book to life and prevents it from becoming a too severely legal treatise. This edition is some seventy pages longer than its predecessor, which appears to be due in part to an improvement in the spacing of the type, but mainly to the inclusion of extra topics and judicial decisions. The many extra cases usefully illustrate the legal development and do not justify the criticism, on grounds of excessive detail, which the learned author fears. Of the Table of Cases and the Table of Statutes, which were both omitted from the previous edition, the former makes a welcome re-appearance and it is hoped that in a future edition the latter may also be restored.

J. W. A. Thornely.

The Elements of Roman Law. Second edition. By R. W. Lee, D.C.L., F.B.A., Reader in Roman Law of the Inns of Court. [London: Sweet & Maxwell, Ltd. 1949. xxiii and 473 and (vocabulary and index) 15 pp. 25s. net.]

Since this book was first published the fact that it has become the standard beginners' textbook is a silent comment on its value and merit. The full and detailed reviews of the earlier edition, and the use which the learned author has made of them, have left little to be said. The book is a well-pruned, careful presentation of Roman law, and of a manageable size. If one comment might be made, it is on the Addendum (which is new) on p. 473, dealing with the Third Chapter of the *Lex Aquilia*. The difficulties presented by this chapter cannot be doubted. But the fact that the author has seen fit to embody a discussion of it in a special note leads one to ask whether it may not have been useful to include also a reference to the possible changes in the meaning of this chapter, in particular to the interesting suggestions in 52 L.Q.R., p. 253, and perhaps also to 38 L.Q.R., p. 220.

It used to be rather a vain hope that the average student would inform himself of Roman Law otherwise than on terms easiest to himself. The present book now gives the student the opportunity to acquaint himself with Roman Law more fully than before, but with no greater difficulty. It is clear and concise, and the translation of the relevant portions of the Institutes, included along with each topic, is its most valuable feature.

R. W. M. Dias.

Legal Theory. By W. Friedmann. Second edition. [London: Stevens & Sons, Ltd. 1949. 470 pp. 30s. net.]

This work, the first edition of which was so enthusiastically received in 1944, has now been carefully revised and brought up to date by the author.

In Part One the discussion of the Greek philosophy of law in Chapter 2 has been expanded. In Part Two a number of recent cases are noted and discussed in the passage on Natural Law in American Jurisprudence in Chapter 9.

Part Three is substantially the same, but in Part Four the discussion of Bentham in Chapter 18 has been enlarged, and in Chapter 19 the passage on American Sociological Jurisprudence has been amplified to include a more detailed analysis of Pound's classification of legal and social interests.

In Part Five Chapter 20 has been brought up to date in conformity with the liquidation of Pashukanis in Russia and the temporary eclipse of the Conservatives in Britain.

In Part Six the author in a new sub-title to Chapter 23 discusses the direction of legal development in present day Britain, and how the judge is to obtain the knowledge of an imaginary legislator. Chapter 24 is a new chapter containing a more general discussion of the same problem. In Chapter 25 a new sub-title on Evidence and Procedure has been added.

Probably the most important change in the new edition is the new Chapter 30 in Part Seven. Here Pound's attempt to establish absolute standards of justice is criticised in the light of Radbush's theory, which is the theme of the whole book, that ultimate values must be believed, they cannot be proved. Chapter 31 is a new chapter though the material is drawn from part of Chapter 2 in the first edition. The conclusion to Chapter 29 has been improved by the addition of two further pages on the judge and social policy, and a good summary which replaces the somewhat abrupt ending of the original chapter.

The place of this work in the juristic literature of our times is already assured, and it only remains to indicate one or two omissions or inaccuracies which seem to have escaped the eye of the author in revising the first edition.

At p. 143 Austin's definition of 'law' is given, whereas it is a definition of 'a law'.

At p. 336 it is observed that all the main common law crimes are now codified, but what of homicide?

At p. 295, in the passage on covenants in restraint of trade, it is remarked that there appears to be no case where the public interest has been allowed to overrule the result reached by a consideration of the interests of the parties. *Wyatt* v. *Kreglinger* [1933] 1 K.B. 793 seems to have been overlooked.

The excellent chapter on Corporate Personality, Chapter 26, would be more complete if it noted the change in the fiction theory since Savigny's day, and referred to Machen's view, propounded in 24 Harv.L.R. 253, 347, that the entity is real, but the personality fictitious.

A feature of the book, perhaps an inevitable one, is the amount of repetition. It might be worthy of consideration whether there could not be some rearrangement to avoid several bites at the same cherry. In particular the long note on *Heydon's Case* and the exclusion of *travaux preparatoires* at p. 337 would surely be better placed at p. 282.

As to technical questions, it may be suggested that the punctuation might be scrutinised with some care. Two instances will suffice. At p. 225, l. 20, the absence of a comma after 'codification' renders the passage misleading. At p. 333, l. 27, there seems to be the suggestion that the German Supreme Court is responsible for post war inflation'. Both these mistakes are repeated from the first edition.

Misprints are rather numerous for a second edition (see 38, l. 19; 128, l. 5; 135, l. 27; 150, l. 6; 159, l. 8; 161, l. 10; 170, ll. 31, 35; 171, l. 10; 198, l. 22; 201, l. 5; 208, l. 28; 212, l. 29; 244, l. 9; 324, l. 32; 331, l. 16; 332, last line; 337, last line; 355, l. 19; 372, l. 19; 378, l. 15; 393, l. 1; 399, l. 9; 420, l. 28; 441, l. 6; 447, l. 34; 458, l. 13).

R. N. G.

Underhill's Law of Torts. Sixteenth edition. By Ralph Sutton, m.a., one of His Majesty's Counsel, a Bencher of Lincoln's Inn, Reader in Common Law to the Council of Legal Education, and Barry Sheen, m.a., of the Middle Temple and the South Eastern Circuit, Barrister-at-Law. [London: Butterworth & Co. (Publishers), Ltd. 1949. civ and 412 and (index) 37 pp. 25s. net.]

This edition follows the general pattern of its predecessors, and the merits of the book are too well known to require further observation. Some twelve new statutes and the leading cases since 1946 are dealt with in the text. The Crown Proceedings Act, 1947 has involved the rewriting of many sections scattered all over the book, and it might, perhaps, be an advantage if a short synopsis of the Act were given in Article 15. In view of recent legislation the chapter in the previous edition on the employers liability to workmen is justifiably omitted; there is a note on the old doctrine of common employment, and the duties of a master to his servant are dealt with in the new Article 72. The Law Reform (Personal Injuries) Act, 1948, and the National Insurance Acts, 1946, are well discussed in the text. A small slip occurs at p. 374 (a), 1949 should be 1948. *Read* v. *Lyons* (1947) has involved a new paragraph at p. 237. At p. 408, line 7, the words quoted, *i.e.*, ' after the act, neglect, or default complained of ' are those of the Public Authorities Protection Act, 1893, and for them there should be substituted ' from the date on which the cause of action accrued ', section 21 (1) Limitation Act, 1939. The new edition will be welcomed by students, and despite the vital and constant changes in this subject we have found no fault of omission or commission in the efforts of the editors to bring their work up to date.

T. E. L.

Cases in Constitutional Law. Third edition revised. By D. L. Keir, Kt., m.a., ll.d., President and Vice-Chancellor, The Queen's University, Belfast; Formerly Fellow of University College, Oxford, and University Lecturer in English Constitutional History, and F. H. Lawson, m.a., d.c.l., of Gray's Inn,

Barrister-at-Law, Fellow of Brasenose College, Oxford and Professor of Comparative Law. [London: Geoffrey Cumberlege (Oxford University Press). 1948. xxviii and 530 pp. and index. 25s. net.]

Students and teachers of Constitutional Law have looked forward for some considerable time to the appearance of a new edition of this most useful work which is so very much more than a mere book of cases. Supplies of the second edition of 1933 have long since been unobtainable, but our welcome to this new volume is tinged with regret on finding that in form it is a reprint from the sheets of the second edition with a new Appendix of fifty-six pages. In this Appendix the authors have sought to bring the text up to date by reference to cases decided and statutes passed since 1932. *Duncan* v. *Jones* receives detailed consideration under the title 'The maintenance of public order'; *Elias* v. *Pasmore*, *Christie* v. *Leachinsky* and *Liversidge* v. *Anderson* are incorporated in the new note on 'Judicial control of public authorities', and some eleven pages are devoted to changes in Dominion Constitutional Law. In particular, the more important provisions of the Crown Proceedings Act, 1947, are reprinted, but we are warned that we must await a later edition for a restatement of the law on this important topic. Here especially the difficulty of bringing material up to date by means of an appendix, becomes apparent, for the authors are compelled to state merely that the law as stated in the text is rendered obsolete. Now that the joint authors' domestic Irish Partition problem has been so happily resolved we venture to express the hope that it may not be long before text and appendix are similarly united.

T. C. T.

Archbold's Pleading, Evidence and Practice. Thirty-second edition. By T. R. Fitzwalter Butler, and Marston Garsia. [London : Sweet & Maxwell, Ltd. 1949. cxxvii and 1551 pp. and (index) 99. £4 4s. net.]

Steadily the law grows. This book is now bigger than ever, thanks to recent legislation. The Criminal Justice Act, 1948, has been incorporated into the text throughout; and a practitioner or student will need to read very carefully through much of this edition.

There are many improvements. The type has been reset and the clear black heavy print is attractive. Printing general rules in italics is a good idea. The change to calling a statute by its short title is very convenient. There are many new sections; and there are many useful pages on the Companies Act, 1948.

Case law is as usual; there is always an indication as to where

to find a case that might have a bearing on a point, with some slight indication of what that bearing may be. *Joyce's Case* (1946) is well done, and the indictment is set out as a precedent. In *Brown* (1890) the accused committed the complete *actus reus*, which was not a crime, therefore his conviction for attempt is now overruled by *Dalton* (1949) 33 Cr.App.R. 102. The editors have not fallen into a common mistake that *Bourne* (1939) has created a defence of Necessity in criminal law: the accused's defence was entirely on the Infant Life Preservation Act, 1929, and the case seems only to add to the law that modern diagnosis has reached such perfection that a doctor can tell some months before confinement that a patient would be unable to survive it.

The sections on Evidence are well written, and very useful in practice. Nevertheless, a practitioner was recently seen to be unsuccessfully searching this edition in hopes of finding when an expert witness could be subpœnaed. The paragraphs on admission of evidence which goes to prove the commission of additional offences to that charged are very helpful; and mainly so because there is so much citation from judgments. *Slender* (1938) might well have been dropped; it is so borderline as to be confusing, and very difficult to distinguish from such cases as *Hamilton* (1927).

An omission that occurs in most books on Criminal Law has at last been corrected in this book. Sections 36 and 37 of the Larceny Act, 1861, on larceny of growing things, are included, and set out together with section 8 of the Larceny Act, 1916; and the interplay between the two Acts is easily to be seen.

The effect of the judgment in *Thorne* v. *Motor Trade Association* (1937) on *Denyer* (1926) is not clearly shown.

Too many books, as does this one, state that the distinction between Larceny and Obtaining by False Pretences 'is now little more than academic' because of the effect of section 44 (3) and (4) of the Larceny Act, 1916. It should be pointed out that it is of a great deal more than academic interest to the victims in cases such as *Cundy* v. *Lindsay* (1878) and *Phillips* v. *Brooks* (1919). This last case might well have been mentioned in the book.

Lawyers and students as well as moralists could disagree with *Archbold's* treatment of some very important topics. There is the statement on p. 4, 'an indictment lies at common law for a breach of duty, which is not a mere private injury, but an outrage on the moral duties of society'. No test is suggested of what constitutes a moral duty; but the statement is illustrated by examples, many of which we recognise as specific crimes, and which appear later in the book as such. It is just as likely that these crimes were based on convenience as on morals. One of these illustrations is 'any act of wilful negligence'. What is 'wilful negligence'? It seems a contradiction in terms. 'Wilful' refers to purpose, 'negligence' suggests lack of purpose. One can speak of a wilful breach of duty or of a negligent breach of duty, but surely not of

an intentionally negligent breach of duty. And what has negligence to do with morals?

There is only one paragraph on *mens rea* and it has not changed one word in over a quarter of a century of editions. A recently published elementary textbook has over eight pages on this topic; and Stroud managed to write a book of 350 pages on *mens rea*. Recent cases such as *Brend* v. *Wood* (1946), *Harding* v. *Price* (1948), and the reason given by the courts for the judgments in such cases, are not even mentioned. Many of the cases used as illustrations are no longer possible, *e.g.*, the statute on which *Laird* v. *Dobell* (1906) was decided has been repealed, and the statute replacing it enacts 'unless he proves that he did not know and could not with reasonable care have known that the article contained', etc. The modern tendency in legislation creating crimes is to insert some such clause.

It is a great pity that something has not been said on p. 913 to suggest a break away from the useless formula used in motor-manslaughter cases to describe gross negligence to a jury; that 'the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment'. What does 'went beyond' mean? And how far 'beyond' will he have to go before it will be enough for conviction? The formula gives the jury no test whatsoever as to what constitutes the very high degree of negligence required for a conviction for manslaughter. The test laid down by the Irish Court of Criminal Appeal in the recent case of *Dunleavy* (1948) 81 Ir.L.T.R. 70, might well have been included as a suggestion. It is that the jury should be told that the negligence must be 'such as to involve in a high degree the risk or likelihood of substantial personal injury to others': thus stating the degree of negligence in terms of the degree of risk. In passing, one might mention, that this test is in accordance with recent ideas expressed in some of the courts of the U.S.A. Under the Criminal Code of Canada manslaughter seems to be taken on ordinary negligence.

On p. 1351 it ought to have been shown much more explicitly how *Wheat and Stocks* (1921) has been affected by the recent cases of *Weiwow* (1945) and *Dolman* (1949). The dicta in *Wheat and Stocks* are no longer accepted.

The great defect of the book is its utter lack of any scientific or academic discussion of important topics in Criminal Law. Modern trends of thought or tendencies of legal development are not even mentioned; there is not a reference to any modern book or article. A few new cases, some of which may have been the subjects of important articles in leading legal journals, are put in without comment; there is no attempt at interpretation or discussion of case law. Lack of criticism in a textbook conceals defects of the law; these come to be taken for granted; and reform is retarded.

The practitioner may be a very busy man, with little time to search out, study, and think over current legal literature; and he might be grateful for bare references as signposts to find his way to new opinions. Perhaps it might be a good step towards reform of Criminal Law to set out portions of a modern Code, such as that of Kenya, in an Appendix, as a comparison to the English law; of Larceny, for instance. However, *Archbold* is put forward as the last word in Criminal Practice for the use of the practitioner; but it is just a huge mass of material; and the practitioner is supposed to dig into it for some idea of what the law may be, but getting no indication of how it is tending to develop; and, if the point in issue is new, this book will give the practitioner no suggestion of what line to take in his argument or of how his case is likely to be decided.

HENRY BARNES.

Cases on Contracts. Third edition. By EDWIN W. PATTERSON, Cardozo Professor of Jurisprudence, Columbia University, and GEORGE W. GOBLE, Professor of Law, University of Illinois. [Brooklyn: The Foundation Press Inc. 1949. xii and 1085 and (tables of legal articles) 13; (of Restatement Citations) 6; (cases) 14 and (general index) 12 pp. $7.50 net.]

THIS is one of the University Casebook Series and an admirable publication. There is nothing like them in this country, no, not even *Smith's Leading Cases*. Here is a big selection of leading contract cases; in some, the judgments are given in full, in others, in abridged form. The notes following each case are intended to prepare students in advance to understand the questions likely to be raised by the instructor in the class discussion. They deal with problems raised but not decided in the leading case, problems just off the line of the main case, and give references to sources from which a solution may be found. They refer to and quote extracts from the standard works, American, Canadian and English periodicals, and the notes on cases in the *Law Quarterly Review* are much in evidence. The notes will certainly make the student think and give him a better understanding of the principles involved. The book covers certain parts of quasi-contract (restitution), and third party beneficiaries. The appendices deal with the Ethical Basis of Contract and Common Counts in *Indebitatus Assumpsit*. This work is a mine of information, extremely well set out and arranged. It is a real boon to a good student. We have sampled various sections and are completely satisfied. It is up to date, and on promissory estoppel reference is made to *Central London Property Trust, Ltd.* v. *Hightrees House, Ltd.* [1947] 1 K.B. 130 and (1947) 63 L.Q.R. 283.

T. E. L.

International Law. Volume I. International Law as Applied by International Courts and Tribunals. By Georg Schwarzenberger. Second edition. [London: Stevens & Sons, Ltd. 1949. liv and 681 pp. £3 3s. net.]

The publication of the second edition of Dr. Schwarzenberger's work follows closely upon the first edition. It is, perhaps, disappointing that we have not yet been given, instead, the second volume of the proposed trilogy. For only when the work is complete will we be able to judge whether a truly useful purpose was served by dealing separately with the different law-making agencies and the law they create. In the meantime, this new edition contains important new material which fully justifies its preparation.

In a new introduction and in a greatly expanded second chapter the author explains his approach to the study of international law. His estimate of the importance to be attached to the pronouncements of different law-making agencies is of particular interest. Everyone who has the increasing co-ordination of international society at heart will agree with him that the greatest possible value should be attached to the pronouncements of international judicial organs. But seeing that many of the extant international decisions have been handed down by tribunals of minor importance, can this general principle be made into an axiom?

Of particular note also is the inclusion in the work of the first two decisions of the International Court of Justice, and the extensive use made of the Nuremberg Judgment—despite the author's conclusion that 'the Nuremberg Tribunal was international more in form than in substance' (p. 314). Finally, we should mention the inclusion of a bibliography of works dealing, to a greater or lesser extent, with the interpretation of international law by international courts.

F. M.

Emmet's Notes on Perusing Titles and on Practical Conveyancing. Thirteenth edition in two volumes. By J. Gilchrist Smith, ll.m., Solicitor. Volume I. [London: The Solicitors' Law Stationery Society, Ltd. 1949. lxxxiii and 623 pp. £3 net.]

It is now some thirty-five years ago since this reviewer first became interested in conveyancing and made the acquaintance of 'Emmet'. So far as we recollect it was the sixth edition and a slender volume about half the total contents of Vol. I of the present edition. 'Notes' are not intended to be exhaustive or necessarily consecutive but are grouped in convenient titles to assist their user on 'points' that may need help. So far as memory serves this is

how 'Emmet' appeared to us then. Literary style or scientific reference was not expected of those helpful jottings. They were essentially for one with some knowledge of the whole subject.

After the 1925 legislation Mr. Emmet, whose book meantime had grown, took upon himself the more ambitious task of explaining its effect and this led to the two volumes which appeared shortly after the Acts and a new edition of which appeared again in 1930–31. Even so the work contained notable omissions of which the greatest was the exclusion of 'registered conveyancing', but there were many others due to the original form of the book.

Mr. Smith has remodelled the form of the book laying the emphasis on 'practical conveyancing' and it is now designed to 'deal fully with all matters arising in normal conveyancing', including registered conveyancing. This has involved a great deal of rearrangement. The present volume is concerned with the sale of a fee simple estate including the rules governing contract, conveyance and completion. Volume 2 promises to contain chapters on Leases, Mortgages, Settled Land, Town and Country Planning and Compulsory Purchase. Rearranging and bringing up to date a work already nearly twenty years old is a herculean labour and much of the book is inevitably new. This, therefore, is the second major operation performed on the little book first produced by Mr. Emmet in 1895. A Notebook is to be turned into a Treatise and this is an ambitious undertaking.

A Notebook should not have pretensions to scholarship nor need it use the mechanics of scholarship. We hope that we are not guilty of disrespect in saying that this was true of 'Emmet' as we first knew it. The Notes on Perusing Titles was eminently the jottings of a practical solicitor who had noted down points which he had to keep in mind or had found necessary to look up and did not want to forget. His method of keeping track of articles he had read and thought worthy of remembering was essentially his own. For example, sometimes he would refer to Preston on Abstracts or Estates or sometimes just to Preston. This in itself is a slight thing, but one of the many facets which showed that the work lacked the basis of a scientific treatise. When Mr. Smith took it upon himself to finish the conversion of the Notebook into a Treatise he did not alter this characteristic and so, for example, though the first sentence on p. 220 is derived directly from 1 Prest. Abs. 62 it now appears without any authority; and on p. 480 two references relate to 3 Prest.Abs. 40, but the volume is not cited and in fact the references are given as to pp. 40 and 41. Likewise his references to contemporary literature, though most valuable and frequent, are verbose and by this method must considerably extend the length of this volume from what would have been necessary with more usual methods of citation. We would suggest with deference that if this work is to become a standard treatise on title

and conveyancing it would be a convenience to adopt the normal method both to save space and facilitate unification.

Similarly, the balance of a Notebook will not necessarily be the same as that of a treatise. When Emmet first published his Notebook no one was likely to buy it who did not have a working practical knowledge of the Statutes of Uses for it was the basis of all conveyancing. The learned author noted some odd points of interest. Now apart from four almost casual references, the whole of this topic appears in the Index under the title Habendum and is dealt with in less than three pages. Yet, of course, from the point of view of investigation of title a knowledge of the learning of the statute is not much less important than before 1926, since so many titles remain affected by it. The modern real property lawyer learns less about it in his student days and needs more not less adequate treatment in a practice book. In the same way, although section 131 of the Law of Property Act only applies when *Shelley's Case* would formerly have done (as the learned author indeed points out) we are given but the briefest account of when that rule, and when section 131, will apply.

This lack of balance in big matters also appears on smaller points. We cannot decide when the learned author will give us a reasonably full account of a case and when he will refer to the name alone. Obviously much latitude must exist here, but we suggest that it should depend upon the intention to discuss it and not either its comparatively recent date or the frequency of its application.

We have ventured to make these two major criticisms because we do not feel that the learned editor has been wholly successful in his undertaking. We think that we might have profited more by a book from his own hand.

Having said this we should congratulate him on what he has done in what was obviously an immense task. He has not spared efforts in reading contemporary literature as well as case law and statutes. When the literature is controversial, as, for example, on the new planning legislation, he has stated, so far as we can judge, fairly and accurately the points of view. We could have wished sometimes that he would refer to case law as his authority for his own preference of these views, if stated, but at least the practitioner is left with a clear guide. The learned editor has also rearranged the work in such a way that it will be much easier to develop it as a treatise and to follow it as a reader. It goes without saying that modern case law and statutes have been incorporated in plenty. If the work is to survive, the learned editor has given it every chance; and we hope that should he undertake a further edition he will do so in more ruthless fashion so that it will cease to be 'Notes' on perusing title.

H. P.

Russell on Arbitration. Fourteenth edition. By Ernest Wetton, of the Middle Temple, Barrister-at-Law. [London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1949. li and 489 and (index) 47 pp. £3 10s. net.]

As a routine new edition of a standard work, this has much to commend it. The cases decided since the last edition in 1935 have been duly incorporated with but few exceptions (*e.g.*, *O'Brien* v. *Perry* (1941) 85 S.J. 142 and *Golodetz* v. *Schrier* (1947) 80 Ll.L.R. 647), and similarly for statutes. There are many other signs of revision, though the position stated on pp. 401 and 411 might have been brought up to some more recent date than August, 1934 and February, 1939, respectively; and as *Pollock's Contracts* reached its twelfth edition in 1946, the references given on p. 350 to vouch what purports to be an exact quotation (but in fact is not) are a little out-dated ('7th ed., at p. 204 (8th ed., at p. 215)'). But it is high time that *Russell*, which has just celebrated its centenary, had a thorough overhaul. At present, it is in a most inconvenient form. The arrangement is as follows:—

1. An introductory section dealing with what can be referred to arbitration, who can refer it, and who can be an arbitrator (34 pp.).
2. The annotated text of the Acts of 1889 and 1934 (362 pp.).
3. Two other arbitration Acts with general annotations appended in such a way as at first sight to appear to be part of the Schedules to the Acts (18 pp.).
4. A note on the International Chamber of Commerce (2 pp.).
5. Forms (44 pp.).
6. Prints of the Acts of 1889 and 1934 without any annotations other than references to repeals and the like (15 pp.).
7. Parts of seven other Acts (4 pp.).
8. Certain rules of court (2½ pp.).
9. Rules of the London Court of Arbitration (9 pp.).

In some ways the most striking feature of this arrangement is that while the annotated Act of 1889 occupies 237 pages, the bare print of the same Act is less than five pages long: and nearly fifty pages of commentary is far more than a single page of the Statute Book can bear with efficiency. On p. 267, a dozen lines of statute are set out: they are 'annotated' for over fifty pages. Then on p. 322, the next portion of the Act is printed ('The award to be made by the arbitrators or umpire shall be final and binding upon the parties and the persons claiming under them respectively'), to form the slender support for thirty pages of notes. Now even if it were really well done, this overgrown annotation would be inconvenient: and in any event, the Act of 1934 and other statutes have made many important changes, so that by following the order of the surviving sections of the Act of 1889 and those of the sections of the Act of 1934, the matter is presented in a far from logical

manner. Nor is the book aided by the considerable measure of repetition and duplication contained in it (see *e.g.*, p. 326 where the effect of section 13 of the Act of 1934 is twice stated), and the information on a single topic is too often dealt with in two or more widely separated places.

Another defect is the lack of signposting: for over 320 pages, the only information at the head of the pages is 'Arbitration and Awards' on the left-hand pages (doubtless to guard against any danger that the reader might be in doubt about what book he is looking at) and 'The Arbitration Acts, 1889 and 1934' on the right, chosen, one supposes, as the most suitable heading for a text which deals almost entirely with the Act of 1889 and very little with the Act of 1934, which is considered later on. No section numbers or other helpful indications are provided. Further, the Table of Statutes omits the Acts of 1889 and 1934, so that although the Table of Contents gives the page at which each section is set out in the part of the book containing the annotated Acts, there is no way of tracing all the references to a section. The Table of Cases is somewhat incomplete in its references to the various series of reports, and contains some curiosities (*e.g.*, under 'J' appears '*Joe Lee, Ltd.* v. *Lord Dalmeny and Others* [1927] 1 Ch. 300 . . . 246', and under 'L' there is '*Lee* (*Joe*), *Ltd.* v. *Dalmeny* [1927] 1 Ch. 300; 96 L.J.Ch. 174; 136 L.T. 375; 71 S.J. 20; 43 T.L.R. 119 . . . 3'), but is sometimes more accurate than the text: compare the plaintiff '*Layen*' on p. xxx with '*Lager*' on p. 137, and the difference of seventy volumes in the citation of *Re O'Connor and Whitlaw's Arbitration* at pp. xxxv and 295. The index, on the other hand, is full and well done.

As *Russell* stands, it contains the raw material for a really good book on arbitration, but it is some way from being such a book. What is needed (apart from improving the tables and other ancillaries) is that the form of the book should be changed from that of annotated statutes to a narrative textbook arranged in a logical order, with, no doubt, the Acts, forms, and other matter reproduced in an appendix. At the very least, if the present form is to be retained, there should be an introduction giving a general outline of the subject, with references to the pages where each point is dealt with in greater detail. The good index does much to mitigate these defects, but if *Russell* is to maintain its position, it must be drastically revised.

R. E. Megarry.

Buckley on the Company Acts. Twelfth edition. By the Hon. D. B. Buckley, M.B.E., M.A., Barrister-at-Law, a Bencher of Lincoln's Inn, assisted by Nigel Warren, B.A., of Lincoln's Inn, and G. Brian Parker, M.A., LL.B., of the Middle Temple,

Barristers-at-Law. Consulting Editor, CECIL W. TURNER, Barrister-at-Law, a Bencher of Lincoln's Inn. [London: Butterworth & Co. (Publishers), Ltd. 1949. ccxxiv and 1236 and (index) 140 pp. £5 5s. net.]

Buckley is the company lawyers' textbook *par excellence*, and this new edition has been very well done. Of the increase of over 400 pages, nearly 140 pages have been added to the preliminary matter, largely due to the inclusion of a proper table of cases with references to every series of reports. The text itself is some 260 pages longer. *Gyton* v. *Palmour* [1945] K.B. 426, might perhaps have been cited on p. 230 or p. 245, and the statement about solicitors on p. 41 has not been law since the Solicitors Act, 1934, was passed : see s. 1. Further, a greater readiness to refer to good articles would be welcomed, *e.g.*, at p. 792 there might be some reference to the articles at (1946) 90 S.J. 375, 388, which critically examine *Greenhalgh* v. *Arderne Cinemas, Ltd.* But really there is very little that can be said of this new edition except praise and gratitude for an excellent piece of work.

R. E. M.

Palmer's Company Law. Edited by His Honour A. F. TOPHAM, LL.M., K.C., a Bencher of Lincoln's Inn. Nineteenth edition. [London: Stevens & Sons, Ltd. 1949. lxxx and 456 and (appendices) 350 and (index) 27 pp. 50s. net.]

THE passing of the Companies Act, 1948, which consolidated the Acts of 1929 and 1947, will no doubt result in new editions of all the major works on company law and the distinguished editor of *Palmer*, who has been responsible for the last nine editions of this book, has wasted no time in bringing it up to date.

The key to *Palmer* lies in its sub-title 'A practical book for lawyers and business men'; the book seeks to fill the gap between the students' handbook (of which the editor's own work is an excellent example) and specialist works, such as Buckley. It is by these standards therefore that it ought fairly to be judged.

The most notable feature of this latest edition is the marked improvement in the set-up of the book, on which editor and publishers alike are to be congratulated. The elimination of case references from the text and the printing of section references to the 1948 Act in heavy type throughout has greatly lightened the reader's task. At the same time it has perhaps rendered more apparent defects in style which have hitherto been obscured; these, however, if temporarily disconcerting, can readily be eliminated when (as is to be hoped) the editor produces a further edition in order to keep the book abreast of the times.

Indeed, the main difficulty with any textbook on this subject is to keep pace with modern legislation and practice, as the editor frankly acknowledges in his Preface. Thus, within nine months of the publication of this edition, much of the information on stamp duty has become outmoded and the House of Lords decisions in the *Chatterly-Whitfield* and *Wilson & Clyde Colliery Cases* have had their repercussions on the rights of preference shareholders. As to the latter, it is only fair to state that the doubts on the validity of *Re Wm. Metcalfe, Ltd.* (which was overruled by those decisions) are admirably summarised on p. 67.

A book which sets out to assist business men might with advantage treat somewhat less cursorily the implications and effect of the Exchange Control Act, 1947, and of analogous legislation which (like income tax, to which a chapter is devoted) tend to pervade the practical problems of modern company law to an increasing and alarming extent. There is much to be said, too, for a reorganisation of the order in which the subject-matter is presented. But the middle course between first principles and specialist treatment is never an easy one to steer and in these difficult waters the editor of *Palmer* is a practised helmsman. *Palmer* remains an admirable guide for those who seek a sound working knowledge of a complex subject.

M. M. Wheeler.

Rayden on Divorce. Consulting Editor C. T. A. Wilkinson, Registrar of the Probate and Divorce Division. Editors F. C. Ottway, of the Probate and Divorce Registry and J. E. S. Simon, of the Middle Temple, Barrister-at-Law. Fifth edition. [London: Butterworth & Co. (Publishers), Ltd. 1949. x and 890 and (index) 113 pp. 75s. net.]

It is easy to forgive one of the learned editors of this book for saying (65 L.Q.R. 276), ' In modern times *Rayden* is pre-eminent '. Even before this edition *Rayden* had rightly become established as the leading textbook on its subject.

From a practical point of view, the most attractive feature of the new edition is the way in which the precedents have been re-drafted. In themselves these precedents are a valuable guide to the many pitfalls in this branch of the law, which, at least so far as pleadings are concerned, is increasingly and regrettably becoming a matter of mumbo-jumbo. The new precedents are designed to meet almost any of the permutations of marital strife. Some of the interlocutory matters are dealt with rather cursorily. For instance, practitioners who wish to appeal to the judge from a decision of the registrar on a question of maintenance will receive little assistance. There is no precedent given, and the inquirer is

referred in succession to pp. 265, 438 and 242 without finding any information about the procedure before the judge, who in fact treats the appeal as a re-hearing.

There are several modifications to the body of the book. Of these the most welcome are the re-writing of the chapter on desertion, which is now logically and comprehensively laid out, and the addition of a chapter on appeals from courts of summary jurisdiction.

The great extension of facilities for trial and the consequent increase in the number of causes reaching the Court of Appeal, many of which are reported, has meant that a book of this kind is unable to deal with the controversial points. The editors have concentrated on giving a digest of important decisions with a list of other authorities in the footnotes. As often happens when an attempt is made thus to provide an exhaustive list of relevant decisions, some of the decisions will be found on examination not to be strictly in point. For instance, *Mummery* v. *Mummery* [1942] P. 107 is cited on p. 141 note (*e*) as support for a proposition regarding condonation. In fact, the case turned on whether desertion had come to an end when the wife for a short time resumed cohabitation with the husband.

These are trivial criticisms, only serving to enhance the general excellence of a book which will without doubt continue to lead the field for many years to come.

GEOFFREY LANE.

The Law of Life Assurance. By DAVID HOUSEMAN, A.I.A., Solicitor of the Supreme Court. Third edition. [London: Butterworth & Co. (Publishers), Ltd. 1949. xxiv and 224 and (index) 15 pp. 15s. net.]

THIS book is primarily intended, according to its Preface, as an introduction to the law of life assurance for those in the service of Life Offices. Mr. Houseman has tried to cover a wide field. He starts with a sketch of the law of contract in general, and then deals with every branch of the law likely to arise in a Life Office.

There is a limit to the amount of material which can usefully be compressed into a small book, and the attempt to deal with complicated subjects in little space has led Mr. Houseman sometimes into obscurity and occasionally into inaccuracy. As an example of the latter, we are told that ' breach of a contract by one party, where the other has fulfilled or is willing to fulfil his obligations, discharges the contract ', with no indication of the delicate distinction between those breaches which do discharge a contract and those which do not. As examples of obscurity, one can mention the sections on agency and negotiable instruments.

Each covers one page and a half, and may be thought to impart just enough learning to be dangerous.

The parts of the book dealing more specifically with life assurance are naturally less compressed. Here Mr. Houseman sets out the law, and supplements it by practical advice, in a way which should be very helpful to the legal staff of a Life Office. He cites a useful collection of insurance cases, and there is a convenient appendix of statutes, forms, etc.

J. G. Le Quesne.

National Insurance. By Douglas Potter, m.a., of the Inner Temple and the South Eastern Circuit, Barrister-at-Law and D. H. Stansfeld, b.a., of Lincoln's Inn and the Western Circuit, Barrister-at-Law. Second edition. [London. Butterworth & Co. (Publishers), Ltd. 1949. xix and 553 pp. 30s. net.]

One of the inconveniences of modern legislation is the great difficulty, not only of understanding it, but even of finding it. The simple minded might turn to the National Insurance Act, 1946, and expect to find therein the law of national insurance. In fact, a zealous seeker would have to read not only the Act but also more than forty sets of Regulations made under the Act, scattered through the volumes of the Statutory Rules and Orders.

Anyone who has to inquire into the law of national insurance will, therefore, be most grateful for this book. It contains the Act itself, as amended by the National Insurance Act, 1949, and all Regulations made under the Act which were in force on July 5, 1949. Both the Act and the Regulations are annotated. There is also a general introduction, in which the authors trace the history of national insurance from the original Workmen's Compensation Act of 1897, summarise the contents of the Beveridge Report and the White Paper of 1944, and then describe in detail the system set up by and under the new Act. Nobody could have made easy reading of this, but one is bound to admire the way in which Messrs. Potter and Stansfeld deal with a very complicated and ramified subject. They have produced a very useful book.

J. G. Le Quesne.

Parker's Election Agent and Returning Officer. Fifth edition. By Sir Oscar F. Dowson and H. W. Wightwick. [London: Charles Knight & Co. 1950. 1 and 567 pp. 63s. net.]

The Representation of the People Act, 1948, which has since given way to the Consolidating Act of 1949, made many changes, some

of them important, in the law relating to parliamentary and other elections. The Act of 1949 received the Royal Assent at the end of November; this edition, which necessarily contains several hundred references to the Act, was published six weeks later—a truly remarkable tribute to the labours of the editors and to the enterprise of the publishers. Readers of this Journal may well be envious; many of them are using textbooks up to fifteen years out of date. We note too that Sir Oscar and his colleague have dealt fully, if cautiously, with the topical issue of intervention by outsiders in parliamentary elections. Section 63 of the Act of 1949 has yet to come before the courts, but it is reasonably clear that it is more restrictive than the general recommendation on this topic of the Committee on Electoral Law Reform, which was not concerned with the mischief of intervention as such.

E. C. S. W.

Law Relating to Hospitals and Kindred Institutions. Second edition. By S. R. Speller, ll.b., of Lincoln's Inn, Barrister-at-Law. [London: H. K. Lewis & Co., Ltd. 1949. xliii and 451 and (appendices) 117 and (index) 19 pp. 42s. net.]

This book covers an extremely wide field and is indispensable to hospital administrators and others who work in hospitals, whether professionally or otherwise. Part I (72 pp.) deals with the classification powers and liabilities of hospitals; Part II (195 pp.) deals with consents to operations and kindred matters, injuries to patients and others, loss of or damage to their property, detention of patients against their will, persons of unsound mind and mental defectives, births and deaths in hospital, ownership of medical records, poisonous and dangerous drugs, including the Penicillin Act, 1947, and the Radioactive Substance Act, 1948. Part III (128 pp) covers professional qualifications, master and servant as affecting hospital staff, statutory regulations and conditions of employment, hospital rates, taxes, duties, levy of charges, raising money for hospitals, nuisance, trespass, search and arrest of suspected persons. Part IV (16 pp.) is concerned with the position of the nurse and nursing homes. Part V (40 pp.) examines the provisions of the National Health Service Act, 1946, and the Public Health Act, 1936. The new edition has been radically changed by the Act of 1946 and the numerous statutory instruments made under it, all this has involved an addition of nearly two hundred pages. Although primarily a book for hospital administrators, a lawyer will find it very useful for the author has considerable experience of legal problems—and they are many—connected with hospitals. Some ninety cases are referred to and all the relevant statutes and orders. In the chapter on injuries to patients all the

recent authorities are discussed; reference is made to articles in legal periodicals and to some unreported cases. *Collins* v. *Herts. C.C.* [1947] 1 All E. R. 633 (not 639); *Marshall* v. *Lindsey C.C.* should be *Lindsey C.C.* v. *Marshall*. The decision of Harman J. in *Re Kellner's Will Trusts, Blundell* v. *Royal Cancer Hospital* [1949] 2 All E.R. 43 referred to in the Addenda (p. xlii) has been reversed on appeal, *ibid.* 774 since the book was published.

T. E. L.

Current Law Year Book, 1948. Edited by Clifford Walsh, ll.b. General Editor: John Burke. [London: Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. 1949. cxlviii and 3990 paras. and (22). £1 15s. net.]

The readers of this Journal will be familiar with this volume which comprises and supersedes the monthly parts of *Current Law* for 1948. Its claim that it contains all the law from every source is not unjustifiable, and it is as helpful to the academic lawyer as to the practitioner. The digesting of articles and books under the relevant headings is particularly useful.

C. J. H.

An Important Chapter from the History of Legal Interpretation. By J. P. Fockema Andreae. [Leyden: A. W. Sijthoff's Publishing Company. 1948. 159 pp. Fl. 12.50.]

The contribution of the Permanent Court of International Justice to the development of international law has been studied and assessed by many writers. The author of the present book examines a special branch of this vast subject and follows up its minute details. Compared with their importance in the international field the rules of interpretation are few and ill-defined, but the frequent occurrence of disputes over the interpretation of treaties provides the student with a great mass of valuable material. The author makes excellent use of it in this essay, the express purpose of which is to describe the various techniques employed by the judges in analysing treaty provisions. This leads naturally to an evaluation of the work and legal background of individual judges of the court. In the end the facts force the author and the reader to the conclusion that the various devices of interpretation are only means to justify at one time a leaning towards historical development and tradition, at another towards logic and certainty, and again at other times towards the realisation of certain social purposes.

Two suggestions, made in passing, deserve attention. First, the author advocates different methods of interpretation according

as the treaty under review is a law-making treaty or not. Second, he believes that the authority of the judgments would be enhanced by greater brevity and conciseness which could be achieved if less attention were paid by the court to considerations which are not necessarily relevant or which are only taken up in order to be dismissed.

K. L.

Essentials of Magisterial Law. By C. B. V. Head, LL.B. [London: Winchester Publications, Ltd. 1949. xxii and 543 pp. 35s. net.]

The dust cover describes this as 'A reference book for counsel, solicitors, lay magistrates, police officers and others engaged in the administration of magisterial law', whilst the Introduction explains that it is a selection of notes that the author made over a number of years in practice. The book begins with a glossary of magisterial law terms (including some that are not terms of law) followed by fifty pages of notes on procedure, notes on a number of specific offences set out in a form that assists rapid consultation, eighty pages of 'potted cases', 240 pages of text of statutes, some forms and an index.

The selection of material for a book of this kind offers great difficulty: if all that is reasonably relevant is included the bulk becomes vast, whilst if anything is omitted it may happen that that is just what the reader is seeking. I tried looking up three points. On the first, the composition of juvenile courts, I found nothing. On the second, the procedure when offences are triable summarily and on indictment, I found a little but insufficient to explain the changes introduced by the Criminal Justice Act, 1948. The third point was 'special reasons' for not allowing automatic disqualification for holding a driving licence to occur: I found something on this, but not enough to be a safe guide for practitioner or magistrate. It would have been better if the author had dealt adequately with 'special reasons', which is a matter that often arises, and omitted some of the more serious indictable offences. After all, murder charges are not frequent and if those concerned want a law book they are hardly likely to turn to a book of this nature.

There is a need for something shorter and easier and cheaper than the trilogy of *Stone*, *Paterson* and *Archbold*. If, as I suggest, Mr. Head's attack on the problem is not particularly successful, it is singularly courageous.

R. M. J.

Books also received:—

Comparative Law. An Introduction to the Comparative Method of Legal Study and Research. By H. C. Gutteridge, K.C., LL.D., Bencher of the Hon. Society of the Middle Temple; Emeritus Professor of Comparative Law and Fellow of Trinity Hall, Cambridge. Cambridge University Press. 1949. xvi and 209 and (index) 5 pp. (15s. net.)—Dr. Gutteridge, one of the pioneers and a master in this special and constantly changing branch of law, here explains the origin and meaning of the term 'Comparative Law', the purposes for which the comparative method may be employed and how it functions, and estimates its value as an instrument for the development of the law. The first edition in 1946 had long been exhausted. He retains the original plan and substance in this edition. Suggestions made by friendly critics have been adopted, many passages have been rewritten and the text brought up to date. The list of foreign law reports and periodicals has been considerably extended by Dr. Lipstein. 'It is a treatise of quite exceptional interest and originality, accurate and complete, and a pleasure to read' (Lord Macmillan, 63 L.Q.R. 227–9).

Modern Equity. Fifth edition. By Harold Greville Hanbury, D.C.L., Subrector and Senior Tutor of Lincoln College, Oxford; University Reader in Equity, of the Inner Temple, Barrister-at-Law, London: Stevens & Sons, Ltd. 1949. xl and 742 and (index) 57 pp. (40s. net.)—Five editions in fourteen years are sufficient evidence of the quality and popularity of *Hanbury*; the reviewer need only note the new material, and there is much of it, both in the text and in the Addenda, pp. 736–742. Some of the subject-matter has been redistributed in various chapters, and many topics have been revised in the light of recent cases, notably tracing the trust fund, equitable estoppel, revocation of licences, charitable trusts, and the rule in *Howe* v. *Dartmouth*. The vicissitudes of the *Diplock* litigation are a heavy burden to any author, but here they are fully and clearly dealt with. At pp. 461/462 dealing with priority notices, the S.R. & O. 1940, Nos. 1998 and 2195 have been overlooked—the notice should be given at least fourteen days (not two), and the charge may be registered within twenty-eight days (not fourteen). Every topic is dealt with in a thorough and scholarly manner, the book stands in a class of its own for it is comprehensive, reliable and eminently readable.

Sutton and Shannon on Contracts. Fourth edition. By Ralph Sutton, M.A., one of His Majesty's Counsel, Reader in Common Law to the Council of Legal Education, and N. P. Shannon, of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1949. xxvi and 438 and (index) 27 pp. (16s. 6d. net.)—This edition follows the form of its predecessors and

maintains their high standard of accuracy, clarity and conciseness. The editors have rightly resisted the temptation of overloading the book with details of statutes such as the Naturalisation Acts and others which do not affect the elements of the law of contract, and they have made a judicious selection of cases decided since 1944, inserting only those which illustrate or modify leading principles. They have also adopted some suggestions made in previous reviews. Many topics have been rewritten, and some enlarged, e.g., consideration and mistake. The important case of *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] K.B. 130 is given the attention it deserves at pp. 46–7. A corrigendum slip has been received as to the effect of the Criminal Justice Act, 1948, indicating that what appears in the book at pp. 90, 354 and 382 relating to the former disabilities of convicts is no longer law. At p. 262 (*u*) a reference might be made to *Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.* [1944] A.C. 265 where Lord Wright at pp. 273–281 critically examines the bases of frustration. The task of revision has been extremely well done.

Current Legal Problems, 1949. Vol. 2. Edited by G. W. Keeton and Georg Schwarzenberger on behalf of the Faculty of Laws, University College, London. London : Stevens & Sons, Ltd. 1949. ix and 286 and (index) 2 pp. (21s. net.)—This volume includes the sixteen public lectures delivered in the Faculty of Laws at University College, London, during the Session 1948–1949. They cover many topics of English law and some of international and foreign law. A team—a very learned one too—would be required to review them in detail. It is much regretted that considerations of space will only permit of giving a list of the subjects and their authors, with a comment here and there. 'The Final Court of Appeal' by Lord du Parcq describes the history and present practice of the House of Lords in its judicial capacity to sit as the Appellate Committee of the full House. Lord Porter in 'English Procedure and Practice, more particularly in Criminal Matters' deals in a humanitarian spirit with the rules of practice and evidence with sound constructive suggestions. Mr. S. G. Vesey-FitzGerald in 'The Reform of the Law of Murder' analyses the definition of murder and the penalty to be attached. His points are that the recognition of two degrees of murder and a discretion given to the judge after verdict as to what sentence should be imposed, would make the law more humane and logical. 'Mens Rea and Bigamy' by Mr. J. L. J. Edwards; 'The Problem of Finding' by Dr. O. R. Marshall; 'The Charity Muddle', by Professor Keeton are a critical examination of the case law on the subjects. Other lectures are 'Three Types of Law', by Dr. Schwarzenberger; 'Philosophy of the Common Law' by Mr. R.

O'Sullivan; 'Some English Civilians', by Professor Jolowicz; 'Codifying English Law', by Mr. D. Lloyd; 'Constitutional Aspect of the Public Corporation', by Professor Wade; 'Right of Public Meeting', by Mr. E. R. Ivamy; 'Twilight of Dominion Status', by Mr. R. FitzGerald; 'Private Law Aspects of Western Union', by Professor Lawson; 'Law in the British Zone of Germany', by Professor Krawinkel; 'Membership of the League of Nations' by Mr. L. C. Green.

Lectures on Legal History. Second Edition. By W. J. V. Windeyer, C.B.E., M.A., LL.B., Barrister-at-Law. Australia: The Law Book Co. of Australasia Pty., Ltd. 1949. xxiv and 344 and (index) 20 pp. (35s. net.)—The first edition was reviewed in Volume VII (1939), pp. 176–7 of this Journal; the book has been revised thoroughly and much of it has been rewritten, though the general arrangement remains the same. The chapter (XXXVI) on Blackstone has been recast, the one on Magna Carta (VII) much enlarged. The sections on *assumpsit*, strict liability, negligence, relation of law and equity are much more full. There are two new chapters—Trial by Jury (V), and Criminous Clerks (VI). The effect of recent literature on legal history is duly shown in the text and some forty cases have been added, also a table of statutes and a useful note on the citation of statutes. It can be thoroughly recommended to every student; it is not heavy-going and it covers the ground well.

The Law of Wills, including Intestacy and Administration of Assets, an Introduction to the Rules of Law and Equity Relating to Testamentary Dispositions. Third edition. By S. J. Bailey, M.A., LL.M., of the Inner Temple, Barrister-at-Law, Fellow of St. John's College, Cambridge, Reader in Law in the University of Cambridge. London: Sir Isaac Pitman & Sons, Ltd. 1948. xxxiii and 261 and (index) 22 pp. (25s. net.)—The last edition was reviewed in Vol. VII, C.L.J. (1941); in substance the book remains the same, but several topics are treated more fully than before, there are numerous changes in detail, and the case law up to the end of 1947 has been incorporated. It is an accurate, well written and up-to-date presentation of the subject.

Copyright. By T. A. Blanco White, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1949. viii and 88 and (index) 2 pp. (4s. net.)—In this, his third addition to that excellent series, *This is the Law*, Mr. Blanco White has again succeeded in reducing a most complicated subject into a readable and intelligible small compass. Here he presents the basic principles, with footnotes calling attention to the formidable details. It is written for the layman, but the practitioner who is not well up in the subject will find much value here before consulting *Copinger*

or *Macgillivray*. Authors of all kinds should never infringe copyright if they read this concise and clear little book.

Police Problems of Today. By Sir Harold Scott, K.C.B., K.B.E., Commissioner of Police of the Metropolis. London: Stevens & Sons, Ltd. 1949. 23 pp. (2s. 6d. net.)—This is the third annual lecture of the Department of Criminal Science, Faculty of Law, University of Cambridge, delivered on March 3, 1949. It was enjoyed and appreciated by an audience which 'filled the house', it is interesting, amusing and informative. Our gratitude and respect for the police will be still greater after reading it.

Guide to National Insurance. By H. Keast. Leigh-on-Sea: Thames Bank Publishing Co., Ltd. 1949. iv and 71 and (index) 12 pp. (2s. net)—This book deals with the obligations of the employer and the employed under the National Insurance Act, 1946, the National Insurance (Industrial Injuries) Act, 1946, and the statutory regulations issued under them. It is well set out and written for the layman. It should be of real help to every employer, to trade union leaders, and to the general reader.

The Elements of the Law of Torts. Second edition. By A. Raymond Blackburn, LL.B., Solicitor of the Supreme Court, and Edward F. George, LL.B., Solicitor of the Supreme Court, Attorney of the Supreme Court of South Africa. London: Sweet & Maxwell, Ltd. 1949. xvii and 292 and (index) 9 pp. (22s. 6d. net.)—The first edition was reviewed in this Journal, Vol. 9, pp. 143–4 and we welcome the new edition. Mr. George is solely responsible for it, and he has incorporated many of the suggestions made by Mr. P. A. Landon in 61 L.Q.R., pp. 203–7. The unusual activity of statute and case law is duly noted in the text, and in our sampling, nothing of importance has been omitted. This edition can be recommended as an accurate, interesting and attractive elementary book on the law of torts.

This is the Law Series. London: Stevens & Sons, Ltd. 1949.

Town and Country Planning Law. Second edition. By J. Kekwick, of Gray's Inn, Barrister-at-Law, and Robert S. W. Pollard, Solicitor of the Supreme Court. v and 119 and (index) 19 pp. (4s. net.)—We welcome the second edition of this useful guide in which laymen, especially those connected with land and building, will find answers in non-technical language to most of their queries. Mr. Kekwick was first in the field with his practitioner's book on Planning; here the authors have written for the student and the landowner.

Children and Young Persons Under the Law. By Charles Winter, ll.m., of Gray's Inn, Barrister-at-Law. viii and 122 and (index) 2 pp. (4s. net.)—This is the first book which attempts to cover the main features of the law, in all its various aspects; affecting juveniles from birth to majority. It deals with legal status, rights, obligations and disabilities; care of children in special categories; protection; health, education and welfare; employment; juvenile delinquency and juvenile courts. There is a bibliography, table of statutes and statutory instruments, and the provisions of the Adoption of Children Bill, which is now an Act are given in italics.

Ranking, Spicer and Pegler's Mercantile Law. Eighth edition. By W. W. Bigg, f.c.a., f.s.a.a., and C. N. Beattie, of Lincoln's Inn, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1948. liv and 608 and (index) 40 pp. (25s. net.)—This book has been thoroughly revised since the previous edition in 1939, nothing of importance has been overlooked in bringing it up to date and new chapters have been added on partnership and arbitration. There is no comparable book of its compass which covers so much ground—contracts, agency, sale of goods, negotiable instruments, suretyship and guarantee, insurance, bailments, carriage, securities, partnership and arbitration and awards—with such clear explanations of the essentials of commercial law. The editors have taken great pains to give every assistance to the general student of commerce, witness the historical introduction dealing with the history of the courts and their present jurisdiction, the sources of law, the history of the law merchant; abbreviations used in citing cases; table of statutes with abbreviated side notes of each section; synopses of every chapter, and a glossary of mercantile terms and legal maxims (pp. 597–608). The following small points occur; p. lii an inference that English equity and the rules of Roman law were the same; p. liv authorised or official reports; p. 17 the two references to *Eccles* v. *Bryant*; and the use throughout of round brackets when square ones should appear in giving the references to cases.

An Outline of the New Planning Law. By Desmond Heap, ll.m., l.m.t.p.i., Comptroller and City Solicitor to the Corporation of London. London: Sweet & Maxwell, Ltd. 1949. xxiii and 160 and (index) 3 pp. (15s. net.)—Mr. Heap has already produced seven treatises on 'Planning', but this new one is particularly welcome, because it is written for the newcomer and it links up the previous law, including the New Towns Act, 1946, the Licensing Planning (Temporary Provisions) Acts, 1945 and 1946, with the Town and Country Planning Act, 1947, and all the regulations, orders and directions up to February 23, 1949. He has succeeded

in his object of providing a ' concise and reasonably complete statement of planning law in as readable a form as possible '. It is an unusually clear explanation of the operation of the Acts and their subordinate legislation. It should be a boon to the student and to all of us who are trying to understand the complexities and full implications of an Act that covers 206 pages in the King's Printer's copy with its voluminous regulations which are still on the increase.

The Law of Trade Unions. Fourth edition. By H. SAMUELS, M.A., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1949. xv and 91 and (index) 5 pp. (7s. 6d. net.)—This excellent outline has gone through four editions in three years and now presents the law as it stands after the repeal of the Trade Disputes and Trade Unions Act, 1927, by the Act of 1946. Recent cases, such as *Willis* v. *Brooks* [1947] 1 All E.R. 191, *B.M.T.A.* v. *Salvadori* [1949] 1 All E.R. 208 (trade union may sue for libel and conspiracy in its registered name), and *R.* v. *National Arbitration Tribunal, ex p. Crowther* [1947] 2 All E.R. 693 (powers of National Arbitration Tribunal) are incorporated in the text. Chapter IV which deals with intimidation, inducement of breach of contract and conspiracy is particularly well done. Practitioners and trade union officials will find this short book extremely useful.

Labour Courts in Latin America. Report submitted by the International Labour Office to the Fourth Conference of American States Members of the International Labour Organisation (Montevideo, April, 1949). The Adjustment of Labour Disputes. Studies and Reports. New Series, No. 13. Geneva: London: Washington: International Labour Office. 1949. 110 pp. (3s. 9d. net.)

Law and Conduct of the Legal Profession in New South Wales. By RICHARD CLIVE TEECE, M.A., LL.B., one of His Majesty's Counsel for the State of New South Wales, President of N.S.W. Bar Association, 1936–47. Lecturer in Legal Ethics and sometime Dean of the Faculty of Law, University of Sydney, and WALTER N. HARRISON, B.A., LL.M., Barrister-at-Law, Garrick Professor of Law in the University of Queensland. Sydney: Melbourne: Brisbane: The Law Book Co. of Australasia Pty., Ltd. 1949. viii and 99 and (index) 3 pp. (15s. net.)—A very useful book designed to give the practising lawyer and the student complete information on the rules of professional conduct and ethics observed by practitioners. It gives an account of the history of the legal profession in England and traces its development in New South Wales. It outlines the rules specially relating to solicitors and barristers, their duties to the law, the court, the public and the profession, the client and the opponent. There is guidance on all points, *e.g.*, robes, etiquette in court and payment of counsel's fees.

Oyez Practice Notes. London: The Solicitors' Law Stationery Society, Ltd. 1949.

No. 7. *Powers of Attorney.* By C. Caplin, ll.b., Solicitor, assisted by A. Wexler, ll.b. 64 pp. (6s. net.)

No. 8. *Local Land Charges.* By C. K. Phillips, m.a., of Lincoln's Inn, Barrister-at-Law. 32 pp. (2s. 6d. net.)

No. 9. *Proving a Will.* By Edgar A. Phillips, o.b.e., ll.b. 90 and (index) 14 pp. (7s. 6d. net.)

No. 12. *Naturalisation and other methods of acquiring British Nationality.* By J. F. Josling, Solicitor. 78 pp. (6s. net.)

No. 13. *Notes on Chancery Practice.* By F. G. R. Jordan. 87 pp. (6s. net.)

No. 17. *Taxation Appeals.* By S. M. Young, of Gray's Inn, Barrister-at-Law, Assistant Solicitor to the Inland Revenue. 74 pp. (5s. net.)

This series maintains the high standard originally set in dealing with topics that are essentially practical.

No. 7 deals with drafting, execution, stamping, filing, interpretation, capacity, duration, duties and liabilities of the donee and the special rules as to dealings with land. There is a collection of precedents and bibliography.

No. 8 will answer any question on local land charges; where to search, what is registrable; how many parts are there to the register; how and when to search; what is the effect of registration of a charge, and of a priority notice.

No. 9 gives the procedural steps to be taken in proving a will, and the fees payable.

No. 12. The text covers twenty-odd pages, the British Nationality Act, 1948, and the Regulations take some thirty-six pages, Home Office forms for application for naturalisation take fifteen pages, and the residue deals with restrictions and disabilities affecting aliens. It is practical and covers the whole field.

No. 13. This seems to be the first small book with an up-to-date account to guide managing clerks and the newly admitted. It fills a gap and is a mine of information.

No. 17. The author has over twenty years' experience of tax appeals, and covers every point one has to face with the Commissioners of Inland Revenue. The book contains a table of cases and all the relevant statutory rules and orders.

The Australian Constitution. An analysis. By H. S. Nichols, m.a.(oxon) of the Inner Temple, Barrister-at-Law, formerly Chief Judge in Equity of the Supreme Court of New South Wales. London: Sweet & Maxwell, Ltd. 1949. xxviii and 358 and (index) 21 pp. (50s. net.)—This book by a former chief judge in equity of the New South Wales Supreme Court was received too late for detailed notice. Lapse of time has emphasised the need for an up-

to-date study to supplement the writings of earlier authorities. It should be particularly welcome to the small group of post-graduate students here who study the federal constitutional systems.

Government by Decree. A Comparative Study of the History of the Ordinance in English and French Law. By MARGUERITE A. SIEGHART, LL.B., DR.JUR. Foreword by C. K. ALLEN, M.C., K.C., D.C.L., F.B.A. London: Stevens & Sons, Ltd. 1950. xxix and 324 and (index) 19 pp. (30s. net.)

Living Law of Democratic Society. By JEROME HALL. Indianapolis: The Bobbs-Merrill Co., Inc. 1949. 146 pp.

Administrative Tribunals at Work. Edited by ROBERT S. W. POLLARD. London: Stevens & Sons, Ltd. 1950. xx and 148 and (index) 6 pp. (17s. 6d. net.)—This is a symposium, published under the auspices of the Institute of Public Administration, with a foreword by Professor W. A. Robson. Chapters are devoted to tribunals for conscientious objectors, those appointed by the Minister of Labour, appeals under the National Assistance Act, 1948, Furnished Houses Rent, Valuation for Rates, Town and Country Planning, and Professional Discipline of Solicitors. A formidable list of administrative tribunals is given at pp. 131–144, and there follows a table of cases, statutes and statutory instruments.

Chancery Lane and its Memories. By A. K. BRUCE. London: Butterworth & Co. (Publishers), Ltd. 1949. 36 pp. (5s. net.)—This will appeal to lawyers and all who are interested in the Lane and its memorable associations. It is an attractive booklet with four delightful drawings by C. E. B.. The treatment of some of the topics is brief, we should enjoy a longer story embracing also war-time memories.

The Principles of Mercantile Law. Seventh edition. By J. CHARLESWORTH, LL.D., of Lincoln's Inn and the North-Eastern Circuit, Barrister-at-Law; Recorder of Scarborough. London: Stevens & Sons, Ltd., Sweet & Maxwell, Ltd. 1949. xxxvi and 385 and (index) 10 pp. (15s. net.)—This is the seventh edition in twenty years of this very useful and reasonably priced book. No changes of any great substance have been made, but a good selection of recent cases illustrating new developments has been incorporated in the text.

Supplement to Watt's Law of Savings Banks. Third edition. By C. L. LAWTON, M.SC.(econ.), of Lincoln's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1949. 42 pp. (7s. 6d. net.)—This is the first supplement to the two volumes of the standard work of the late John Y. Watt, brings it up-to-date and

incorporates the Savings Banks Act, 1949, and various Trustee Savings Bank rules and orders of 1948 and 1949.

The Solicitor's Guide to Development and Planning. (*Oyez Practice Notes*, No. 14.) By R. N. D. Hamilton, Solicitor. London: The Solicitors' Law Stationery Society, Ltd. 1949. 131 pp. (7s. 6d. net.)—This is based on the author's series of articles in the *Solicitors' Journal* with much new matter added. Its style is attractive, it is easy to read; though the approach is essentially practical it is suitable for a beginner and an excellent guide to the intricacies of control of development. The author does not think the Act has effected a revolution in land tenure (pp. 108–116), but on this and some of the views expressed on Conveyancing Practice, there appears to be a difference of opinion.

The Law of Divorce and Matrimonial Causes in a Nutshell. By Ian Fife, of the Inner Temple and Oxford Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1949. ix and 116 and (index) 8 pp. (6s. net.)—Much material has been accurately condensed into a small bulk under Principles, Practice and Procedure and Courts of Summary Jurisdiction. It is useful as an introduction and as a means of revision.

A Supplement to Town and Country Planning Law. By James Kekwick, of Gray's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1949. viii and 294 and (index) 31 pp. (25s. net.) Main work with Supplement (60s. net.)—It includes an introduction to the Town and Country Planning Act, 1947, and its Regulations setting out what may be done without planning consent and without liability to development charge, and what may be done without payment of development charge. Then follows a noter-up of some fifty pages, and appendices of regulations and orders with useful annotations, some circulars and forms, and restrictions under the Building Restrictions Act, 1946, and the Ribbon Development Act, 1935, as amended by the Act of 1947.

In the Shadow of Fear. American Liberties, 1948–49. New York: American Civil Liberties Union. Twenty-ninth Annual Report, 1949. 88 pp.—Deals with the effect of the cold war against Communism making the maintenance of civil liberties precarious.

Second Thoughts on Life, Law and Letters. By A. Laurence Polak, B.A., Solicitor of the Supreme Court. Illustrated by Leslie Starke. London : Stevens & Sons, Ltd. 1949. ix and 111 and (table of cases and statutes) 4, and (index) 18 pp. (6s. net.)—We welcome this delightful collection of some twenty-eight essays by the author of *Legal Fictions*, *More Legal Fictions* and *Final Legal Fictions*. Here is a delicious admixture of wit and learning

affording real entertainment. The illustrations by Mr. Leslie Starke, of *Punch*, reflect the spirit of the essays. May the author produce still more for our leisure library.

Under God and the Law. Papers read to the Thomas More Society of London. Second series. Edited by Richard O'Sullivan. Oxford : Basil Blackwell. 1949. xxviii and 171 pp. (10s. 6d. net.) —This contains two essays on Sir Thomas More, one on his early days and formative years by Professor A. W. Reed, the other by Mr. T. S. Gregory analyses his controversial writings. Mr. Richard O'Sullivan's introduction is entitled ' The Christian Spirit of the Common Law ', and the other seven chapters deal mainly with the Constitution of the Church and its relation to the State in the East and in the West.

Supplement to Rent and Mortgage Interest Restrictions. Twenty-first edition. By the Editors of *Law Notes.* London: *Law Notes* Publishing Offices. 1949. xiv, 111 and (index) 7 pp. (10s. 6d. net.)—This brings the work up to date to July, 1949. The Landlord and Tenant (Rent Control) Act, 1949, is fully annotated, the Regulations under the 1946 and 1949 Acts, explanatory leaflets issued by Tribunals under both Acts, are set out, and some seventy recent cases are digested at pp. 57–94.

Green's Death Duties. By G. M. Green, ll.b., Solicitor, of the Estate Duty Office. Second (Cumulative) Supplement to the second edition. London: Butterworth & Co. (Publishers), Ltd. 1949. xi and 72 pp. (7s. 6d. net; with the main work 55s. net.) —This states the law as it existed on September 1, 1949.

Payne's Carriage of Goods by Sea. Fifth edition by John Samuel-Gibbon, m.a., of the Middle Temple, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1949. xxv and 173 and (index) 11 pp. (15s. net.)—This is a clear and reliable introduction to the subject brought up to date by the inclusion of some fifteen cases and four statutes since the previous edition in 1939. The book covers a very wide field, and for that reason and the fact that it is a student's first book, decisions on ' war-like operations ' are excluded.

Crime and Abnormality. By Cecil Binney, m.a., Barrister-at-Law. Home University Press, London; New York; Toronto. Oxford: Geoffrey Cumberlege (University Press). 1949. vii and 172 and (table of cases, statutes, index) 4 pp. (5s. net.)—This little book is a very readable and accurate account of the existing law on insanity, mental deficiency and drunkenness as a defence to, or an excuse for a crime. There is a chapter on infanticide and suicide. The author is a practising barrister and deals with the

law as it is actually administered, but he devotes a chapter to suggestions for reform. The general reader will find it very interesting and we cordially recommend it.

A Treatise on the Law of Prize. Third edition. By C. John Colombos, ll.d., of the Middle Temple, Barrister-at-Law. Sometime Professor at the Hague Academy of International Law. The Grotius Society Publications, No. 5. London: Longmans, Green & Co., Ltd. xiii and 390 and (table of cases) 11 and (index) 19 pp. (30s. net.)—Those concerned with prize matter will welcome this up-to-date edition which incorporates the substance of some one hundred and fifty new cases. It is a treatise of international importance and no effort has been spared to collect decisions of foreign countries given during the war; notes from documents and transcripts have been made when the cases were unobtainable in full.

Hill and Redman's Complete Law of Landlord and Tenant. By W. J. Williams, b.a., of Lincoln's Inn, and Miss M. M. Wells, m.a., of Gray's Inn, Barristers-at-Law. Second Cumulative Supplement to Tenth edition. London: Butterworth & Co. (Publishers), Ltd. 1949. xvi and 96 pp. (7s. 6d.; Main work and Supplement 63s. net.)—This brings the main work up to date to July, 1949.

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The Supreme Court and Civil Liberties. How Far has the Court Protected the Bill of Rights? Third revision. By OSMOND K. FRAENKEL. New York City: published by the American Civil Liberties Union. October, 1949. 80 pp.

Strong's Practical Guide to Searches on Dealings with Land. Second edition. By C. H. OLIVER, LL.B., Solicitor (Hons.). London: The Solicitors' Law Stationery Society, Ltd. 1950. xx and 155 and (index) 15 pp. (18s. net.)

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Records of the Court of Chancery of South Carolina, 1671–1779. American Legal Records, Vol. 6. Edited by ANNE KING GREGORIE, Editor, *South Carolina Historical and Genealogical Magazine.* Introduction by J. NEILSON FRIERSON, Dean Emeritus, South Carolina Law School. Washington: The American Historical Association. 1950. 651 and (list of cases) 8, and (index) 14 pp. ($10.00 net.)

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Cases, Materials and Problems on Law and Accounting. By Donald Schapiro, Instructor in Law, Yale University, and Ralph Wienshienk, ll.b., c.p.a., Visiting Lecturer in Law, Yale University, Member of the New York Bar. Brooklyn: The Foundation Press, Inc. 1949. xxi and 926 and (index) 2 pp. ($8.00 net.)—The relationship between law and accounting becomes closer every day,

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Challenge of Conscience. The story of the Conscientious Objectors of 1939–1949. By Denis Hayes, ll.b. Foreword by Fenner Brockway. London: Published for the Central Board for Conscientious Objectors by George Allen and Unwin, Ltd. 1949. xvi and 394 and (index) 12 pp. (15s. net.)

Defeat of Justice. By Basil H. Pollit, of the Miami Bar. Reprint from *Florida Law Journal.* April, 1949. 15 pp.

Proceedings of the Provincial Lawyers' Conference held at Kurnool. December, 1948. Madras. 58 pp.

Rent Tribunals. By Harry Samuels and Robert Chope. London: Stevens & Sons, Ltd. 1949. viii and 92 pp. (4s. net.) —This is one of the series of popular handbooks called ' This is the Law '.

Housing Subsidies and Rents. By J. R. Jarmain. London: Stevens & Sons, Ltd. 1948. 294 pp. (25s. net.)—This book is published under the auspices of the Institute of Public Administration. It is a most valuable study of economics and local authorities' administration.

Compulsory Purchase of Land. By A. J. W. Jeffery, d.p.a., a.c., a.c.i.s. Leigh-on-Sea: The Thames Bank Publishing Co., Ltd. 1949. xx and 145 pp. (15s. net.)—A useful small book on action by local authorities under the Acquisition of Land (Authorisation Procedure) Act, 1946.

The Institutions of Private Law and Their Social Functions. By Karl Renner, Federal President of the Austrian Republic. Edited, with an Introduction and Notes, by O. Kahn-Freund, ll.m., dr. jur. London: Routledge & Kegan Paul, Ltd. 1949. viii and 307 pp. (25s. net.)—Dr. Kahn-Freund has written such an adequate introduction to this book, which is well known on the Continent as a Marxist study of law, that it is possible to appreciate the position of Renner without reading the text.

Advertisement Control. By A. M. Lyons, K.C., and S. W. Magnus, B.A. Leigh-on-Sea: Thames Bank Publishing Co., Ltd. 1949. xxv and 197 pp. (12s. 6d. net.)

The New Law of Education. By M. M. Wells, M.A., and P. S. Taylor, M.A. London: Butterworth & Co. (Publishers), Ltd. 1949. xx and 644 pp. (21s. net.)—This is the third edition of a book that became a standard work on its first appearance in 1944.

Local Government Law: Text, Cases and Other Materials. By Jefferson B. Fordham, Dean of the College of Law and Professor of Law, the Ohio State University. Brooklyn: The Foundation Press, Inc. 1949. xxx and 1,060 pp. ($8 net.)—This is one of the American *University Casebook Series.*

Reforma de la Sociedad Anonima. Second edition. Instituto de Estudios Politicos. Madrid. 1949.

International Court of Justice. Peace Palace, The Hague, Holland.

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Law Reports of Trials of War Criminals. Selected and prepared by the United Nations War Crimes Commission. London: Published for the United Nations War Crimes Commission by His Majesty's Stationery Office. 1949. (5s. net each volume.)

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